CLERK'S COPY.

Vol. I

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 270

THE PRUDENCE COMPANY, INC., PETITIONER,

vs.

FIDELITY & DEPOSIT COMPANY OF MARYLAND AND AMERICAN BONDING COMPANY OF BALTIMORE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JULY 22, 1935.

CERTIORARI GRANTED OCTOBER 14, 1935.

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108	Letter dated Oct. 16, 1929, of Central Park Properties to Frank Grad	1169	789
109	Contract, dated April 22, 1931, between 58-59 Realty Corp. and Otis Elevator Co. (printed in part)	1442	790

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K—Estimate submitted to Mr. Lukach, dated April 8, 1931, for painting work	960	851
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R—Schedules of Landsman, regarding costs of papering and painting (not printed)	1396	.....

United States District Court

Southern District of New York

1

THE PRUDENCE COMPANY, INC., *Plaintiff,*
against
FIDELITY AND DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE,
Defendants.

Statement Under Rule XIII.

This action was commenced in the Supreme Court, State of New York, County of New York, by the service of a summons and complaint on the 19th day of February, 1932.

The case was removed into the United States District Court, Southern District of New York, 2
and a certified copy of the record on removal was filed in the office of the Clerk of that Court on April 29, 1932.

The defendants filed their answer on the 29th day of April, 1932. A motion was made on May 17, 1932, to strike out certain affirmative defenses in the answer, and an order granting the same in part was entered on February 17, 1933.

The defendants filed an amended answer on the 2nd day of March, 1933. A motion was made on March 10, 1933, to strike out certain defenses in the amended answer, and an order granting the same in part was entered on July 28, 1933.

The defendants filed an amendment to the 3
amended answer on the 10th day of May, 1934.

There was no arrest of the defendants, no bail taken and no property attached or arrested.

The trial was held before Hon. Clarence G. Galston on the 4th, 7th, 8th, 9th, 10th, 11th and 14th days of May, 1914.

Judgment was entered on the 14th day of June, 1934.

The names of the parties are as set forth in the caption above and there has been no change of parties or attorneys since the commencement of the action.

Appeal was taken on the 10th day of September, 1934.

Summons.

SUPREME COURT,

NEW YORK COUNTY.

Trial desired in the County of New York.

THE PRUDENCE COMPANY, INC.,
Plaintiff,

against

FIDELITY AND DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE,
Defendants.

To the above named Defendants:

YOU ARE HEREBY SUMMONED to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorney within twenty days after the service of this summons exclusive of the day of service, and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated, New York, N. Y., February 18th, 1932.

ALFRED T. DAVISON,
Attorney for Plaintiff,
Office & P. O. Address,
2396 Third Avenue,
Borough of Manhattan,
New York, N. Y.

Complaint.

SUPREME COURT, 7

NEW YORK COUNTY.

The name of the County which the plaintiff designates as the place of trial is the County of New York.

THE PRUDENCE COMPANY, INC.,
Plaintiff,

against

FIDELITY AND DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE, 8
Defendants.

Plaintiff, for its complaint against the defendant, by ALFRED T. DAVISON, its attorney, alleges that:

FOR A FIRST CAUSE OF ACTION:

I. At all the times hereinafter mentioned, the plaintiff was and now is a domestic corporation organized and existing under the Laws of the State of New York.

9

II. At all the times hereinafter mentioned, each of the defendants was and now is a foreign corporation organized and existing under the Laws of the State of Maryland, and each of said defendants was and now is authorized to transact business in the State of New York, the defendant Fidelity and Deposit Company of Maryland having an office at No. 55 Liberty Street, in the Borough of Manhattan, City, County and State

10 of New York, and the defendant American Bonding Company of Baltimore having an office at No. 16 Court Street, in the Borough of Brooklyn, County of Kings, City and State of New York.

III. On or about the 24th day of September, 1929, the plaintiff and Central Park Properties, Inc., a New York Corporation, executed and delivered, each to the other, an agreement dated September 24th, 1929 (nerinafter referred to as "Building Loan Agreement"), wherein said Central Park Properties, Inc. was referred to as the "borrower" and this plaintiff was referred to as the "lender".

11

IV. In and by said Building Loan Agreement, this plaintiff (lender) agreed to lend and advance to the Central Park Properties, Inc. (borrower) the principal sum of Six Million, Six Hundred Fifty Thousand Dollars ($6,650,000.00), and the said Central Park Properties, Inc. (borrower) agreed to take said loan and the advances on account thereof.

V. In and by said Building Loan Agreement, it was agreed that said loan (referred to in subdivision marked "IV" hereof) should be evi-

12 denced and secured by a bond and mortgage, which said mortgage should be a valid first lien upon the premises on the South side of West 59th Street, in the Borough of Manhattan, City, County and State of New York, distant 100 feet easterly from the corner formed by the intersection of the said southerly line of West 59th Street and the easterly line of Seventh Avenue, said premises extending from the southerly side of West 59th Street to the northerly side of West 58th Street, and being 206 feet, 4 inches in width on West

59th Street and West 58th Street, and 200 feet, 10 inches deep on each side, on which said premises the said Central Park Properties, Inc. (borrower) agreed to erect, according to the plans and specifications theretofore submitted to and approved in writing by the lender (this plaintiff), (which said plans and specifications are hereinafter referred to as "plans and specifications") a modern 40 story and basement fireproof hotel, containing 1269 rooms and 687 bathrooms, together with the usual equipment installed in buildings of that type, not including hotel furniture and furnishings, and which said hotel or building is hereinafter referred to as "building". 13 14

VI. In and by said Building Loan Agreement, Central Park Properties, Inc. (borrower) agreed to cause the said building to be completed and ready for occupancy not later than December 16, 1930.

VII. In and by said Building Loan Agreement Central Park Properties, Inc. (borrower) agreed as follows:

> "The Borrower shall furnish to the Lender a surety bond in the amount of $3,000,000., in a company satisfactory to Lender, to be in form and contents satisfactory to Lender, conditioned upon and guaranteeing completion of said building within the time hereinafter specified in strict accordance with said plans and specifications and this agreement and free from claims or liens." 15

VIII. In and by said Building Loan Agreement, it was agreed by and between this plaintiff (lender) and said Central Park Properties, Inc.

16 (borrower) that the said loan was to be advanced in such amounts and at such times as the lender (this plaintiff) should approve, and that advances might be made by this plaintiff (lender) as and when it believed it advisable so to do, and that all such advances or payments should be deemed to have been made in pursuance of said Building Loan Agreement, and that the making of any advance or any part of an advance should not be deemed an approval or acceptance by the lender (this plaintiff) of the work theretofore done.

IX. Thereafter and on or about the 25th day
17 of September, 1929, the defendants, for a valuable consideration, made, executed and delivered to the plaintiff their joint and several surety bond in the amount of Three Million Dollars ($3,000,000.), conditioned upon and guaranteeing completion of the building described in the Building Loan Agreement not later than the 16th day of December, 1930, in strict accordance with the said Building Loan Agreement and the said plans and specifications and free from liens or claims, and which said bond or undertaking is hereinafter sometimes referred to as the "Surety Bond".

18 X. Said Surety Bond was the Surety Bond referred to in that part of said Building Loan Agreement which is hereinabove quoted in subdivision marked "VII" hereof.

XI. Said Surety Bond was executed and delivered by the Central Park Properties, Inc. (thereinafter sometimes called the "Principal"), as Principal, and by the defendants (thereinafter sometimes called the "Surety") as sureties.

XII. In and by said Surety Bond above mentioned, the said Central Park Properties, Inc. as

Principal, and the said defendants, as Sureties, bound themselves, jointly and severally unto the plaintiff (thereinafter sometimes called the "Obligee"), as Obligee, in the principal sum of Three Million Dollars ($3,000,000) lawful money of the United States of America for the payment whereof to the said Obligee (this plaintiff), its successors and assigns, the said Principal (Central Park Properties, Inc.) and the said Sureties (the defendants herein), thereby bound themselves and their respective successors and assigns, jointly and severally, firmly by said Surety Bond. 19

XIII. Said Surety Bond recited that the Principal (Central Park Properties, Inc.) and the said Obligee (this plaintiff), had entered into the Building Loan Agreement dated the 24th day of September, 1929, hereinabove mentioned, and duly filed in the office of the Clerk of the County of New York on the 29th day of September, 1929, and said Surety Bond contained the further recital or provision as follows: 20

> "and said building loan agreement" (being the Building Loan Agreement mentioned and described in subdivision marked "III" hereof) "and all and singular the terms thereof are hereby made a part of this bond by reference thereto with the same force and effect as if set forth in full in the body hereof, being hereinafter referred to as the 'building loan agreement';" 21

XIV. Said Surety Bond contained the further recitals as follows (the word "Principal" as herein used meaning Central Park Properties, Inc., and the word "Surety" meaning the defendants herein, and the word "Obligee" meaning this plaintiff):

22 "WHEREAS the principal, among other things, has agreed to erect, construct and complete on the said described premises" (being the premises described in Subdivision marked "V" hereof) "a modern forty (40) story and basement fireproof hotel containing twelve hundred and sixty-nine (1269) rooms and six hundred eighty-seven (687) bathrooms, together with electrical refrigeration and the usual equipment installed in buildings of this type, excepting hotel furniture and furnishings; and

23 WHEREAS, the said building is to be erected, constructed and completed in accordance with the plans and specifications prepared by Frank Grad, Architect, of No. 521 Fifth Avenue, New York City, heretofore delivered by the Principal to the Obligee, and amendments thereto made by the Obligee in a memorandum dated September 24, 1929, and said plans and specifications and the amendments thereto" (being the same Plans and Specifications referred to in Subdivision marked "V" hereof) "are hereby referred to and incorporated in and made a part hereof with the same force
24 and effect as if set forth in full in the body hereof, being hereinafter together referred to as the 'plans and specifications'; and

WHEREAS, the Principal has agreed to deliver to the Obligee a surety bond in the amount of $3,000,000 in a company satisfactory to the Obligee, to be in form and contents satisfactory to the Obligee, conditioned upon and guaranteeing completion of the said described building not later than the 16th day

of December, 1930, in strict accordance with the said building loan agreement and the said plans and specifications and free from liens or claims, and the Obligee has consented to accept this bond; and

WHEREAS, the Principal and Surety are thoroughly familiar with all of the terms, provisions, conditions and requirements contained in said building loan agreement and with the said plans and specifications and all of the details thereof, and are duly authorized and empowered to make, execute and deliver this bond by their respective boards of directors;"

XV. After making the foregoing recitals the condition of such Surety Bond so executed and delivered by the defendants, as Sureties, to this plaintiff as hereinabove set forth, was stated to be and was and is as follows (the words "Principal", "Surety" and "Obligee" as herein used having the same meaning as above set forth):

"NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION IS SUCH:

That if the said Principal shall from the date hereof continuously proceed with reasonable speed and in a workmanlike manner with the construction and completion of said building in accordance with the terms, provisions and conditions of said building loan agreement and the said plans and specifications, so that the said building shall be well and truly constructed and completed in strict accordance with said building loan agreement and with said plans and specifications and

fully completed and ready for occupancy as a modern hotel not later than the 16th day of December, 1930, together with all equipment customary in a building of the type provided for in said building loan agreement, installed not later than the said 16th day of December, 1930, in all respects fully complying with the building Code of the City of New York, and with all laws, rules, ordinances, regulations and requirements of the County of New York, City of New York, and State of New York, and any governmental bureau, department, officer or agent applicable to the erection and construction of said building or to the use and occupancy thereof, and the Board of Fire Underwriters having jurisdiction thereof, and free and clear of and from any and all mechanics' or materialmen's liens or other liens, claims of architects, conditional sale contracts, chattel mortgages and charges for work and labor performed or for materials, machinery, fixtures, refrigerating units, appliances or equipment used or installed in or about the said building, and any municipal violations against said premises and the improvements thereon: AND IF said Principal shall pay the entire cost of the erection, construction and completion of said building, and for all equipment to be installed therein in accordance with said building loan agreement and plans and specifications; AND IF the said Surety shall fully indemnify and save harmless said Obligee, its successors and assigns, from and against any and all loss or damage by reason of failure of the Principal to con-

struct, fully pay for and complete said building and install, supply and fully pay for such equipment within the time aforesaid and as provided for in said building loan agreement and plans and specifications; AND IF said Surety shall make good any and every default on the part of the Principal in constructing, paying for and completing said building and supplying, installing and paying for equipment as aforesaid, and shall make good any and every other default by the Principal in performing any of the other terms, covenants or conditions in said building loan agreement set forth by the Principal to be kept and performed up to and including the completion of and payment for said building and installation of and payment for said equipment in accordance with said building loan agreement and plans and specifications, free and clear as aforesaid, within the time aforesaid and in the manner that the Principal is obligated to keep and perform the same, and shall fully indemnify and save harmless the Obligee, its successors and assigns, from and against any and all loss or damage by reason of any and all claims, costs, suits, judgments, counsel fees and damages which may be incurred or suffered by the Obligee in making good any default on the part of the Principal and/or Surety, and shall fully comply with the terms, covenants and conditions hereinbefore and hereinafter set forth on the part of the Principal and/or Surety to be performed; THEN this obligation to be and become void, otherwise to remain in full force and effect."

34 XVI. The said surety bond so executed and delivered by the defendants, as Sureties, to this plaintiff, as hereinabove set forth, further provided:

> "No changes from said plans and specifications above referred to, including any changes in the design or cubic contents of or the materials or equipment in said building or in the performance of the work of construction of said building, and no delay, neglect or failure of the Obligee to proceed promptly or otherwise to enforce the completion of said build-
35 ing by the Principal or enforce any remedy it may have against the principal, and no act done or omission of or action or proceeding taken by the Obligee in case of any default by the Principal, shall in any respect release or relieve the Principal or Surety from their obligations hereunder (which shall also include all such changes)."

XVII. Thereafter and prior to the 16th day of December, 1930, this plaintiff, being satisfied that it was advisable to make such advances, advanced to the principal, Central Park Properties, Inc.,
36 at various times and in various amounts, the sum of Six Million Six Hundred Fifty Thousand Dollars ($6,650,000.), of which the sum of Seventy-five Thousand Dollars ($75,000) was deposited by said principal with the plaintiff and which said sum of $75,000. was thereafter applied by the plaintiff on account of the said principal of $6,650,000., leaving a balance due and owing of Six Million Five Hundred Seventy-five Thousand Dollars ($6,575,000.), with interest thereon.

XVIII. Such advances hereinabove set forth in subdivision marked "XVII" hereof, by this plaintiff to said Central Park Properties, Inc. were made in such amounts and at such times as this plaintiff (lender) approved, and were made in pursuance of said Building Loan Agreement. 37

XIX. Before the final advance was made by this plaintiff to said Central Park Properties, Inc., as set forth in subdivision marked "XVII" hereof, Central Park Properties, Inc. (borrower) obtained and delivered to this plaintiff (lender) the usual Certificate of Completion, issued by the Building Department of the Borough of Manhattan, City and State of New York. 38

XX. Plaintiff has duly performed all the conditions of such surety bond on its part.

XXI. Said building was not fully completed and ready for occupancy as a modern hotel on the 16th day of December, 1930, together with all equipment customary in a building of the type provided for in said Building Loan Agreement.

XXII. On or about the 23rd day of December, 1930, said Central Park Properties, Inc. abandoned the completion of said building and left said building in an unfinished state. 39

XXIII. The said Principal (Central Park Properties, Inc.) did not construct and complete said building in accordance with the terms, provisions and conditions of said Building Loan Agreement and the said plans and specifications, and failed to comply with said Building Loan Agreement and with the said plans and specifications in that it was necessary to furnish and sup-

40 ply the labor and materials mentioned and set forth in subdivision marked "XXXV" hereof and in Schedule A hereto annexed in order to complete said building to the extent of making the same ready for occupancy and in that omissions of labor and materials called for by said Building Loan Agreement and said plans and specifications and substitutions of inferior materials were made in the construction of said building to the extent set forth in subdivision marked "XXXVI" hereof and in Schedule B hereto annexed, and said building was not well and truly constructed and completed in strict accordance with said Building
41 Loan Agreement and with said plans and specifications.

XXIV. The said Principal (Central Park Properties, Inc.) did not pay the said cost of the erection, construction and completion of said building and for all equipment to be installed therein, in accordance with said Building Loan Agreement and said plans and specifications; for particulars in connection with these defaults, this plaintiff refers to Schedule A and Schedule B hereto annexed, and as hereinafter set forth.

42 XXV. The said Surety (the defendants herein) have not indemnified and saved harmless the said Obligee (this plaintiff) from and against any of its loss and damage by reason of the failure of the Principal (Central Park Properties, Inc.), to construct, fully pay for and complete said building and install, supply and fully pay for such equipment on or before the 16th day of December, 1930, and as provided for in said Building Loan Agreement and said plans and specifications, and

said defendants have not paid to this plaintiff any of its loss and damage so suffered and sustained. 43

XXVI. Said Surety has not made good the defaults on the part of the Principal (Central Park Properties, Inc.) hereinabove set forth, or any of them.

XXVII. The said Surety (the defendants herein) have not indemnified and saved harmless the Obligee (this plaintiff) from and against its loss and damage by reason of any and all costs, counsel fees and damages which have been incurred and suffered by this plaintiff in making good the defaults on the part of the Principal and Surety. 44

XXVIII. Plaintiff notified the defendants of defaults by the Principal and Surety in the performance of the obligations contained and set forth in said Surety Bond.

XXIX. Defendants and each of them had notice from plaintiff of the fact that said building, referred to in said Surety Bond and said Building Loan Agreement, was not completed in accordance with the said Building Loan Agreement and said plans and specifications.

XXX. On the 14th day of February, 1931, and on the 25th day of February, 1931, plaintiff delivered or caused to be delivered to defendants letters, notifying them of the defaults of Central Park Properties, Inc., above set forth, which said letters were received by defendants. 45

XXXI. Plaintiff has demanded on numerous other occasions that defendants carry out and perform the covenants and obligations contained in said Surety Bond and defendants and each of

46 them, have failed and refused to carry out and perform the same.

XXXII. Defendants did not proceed or procure others to proceed with the construction and completion of said building and the supplying and installation of equipment therein.

XXXIII. After the defendants had failed for a period of more than twenty days following the receipt of the letters referred to in subdivision marked "XXX" hereof to proceed with or procure others to proceed with the construction and completion of said building and the supplying and
47 installation of equipment therein, plaintiff employed a contractor, sub-contractors, architects, superintendent, foremen, mechanics and labor and purchased materials, plant, machinery, fixtures and equipment necessary to construct and complete said building in general accordance with said building loan agreement and plans and specifications, and constructed and completed said building in general accordance with said building loan agreement and plans and specifications to the extent of making the same ready for occupancy.

48 XXXIV. The first date on which the said building was constructed and completed to the extent of making the same ready for occupancy was the first day of October, 1931.

XXXV. Plaintiff has expended for labor and materials in completing said building to the extent of making the same ready for occupancy, the sum of One Hundred Sixty Six Thousand Fifty Four and 29/100 Dollars ($166,054.29), a detailed statement of which is more particularly set forth

in Schedule A hereto attached and hereby made a part hereof. Said work, labor and services rendered and said materials furnished, as hereinabove mentioned, are set forth and numbered in Schedule "A" hereto annexed, and the amounts set forth in said Schedule "A" are the reasonable value of each item. 49

XXXVI. By reason of the omissions of numerous items and the substitutions of inferior materials in the construction of said building, which such omissions and substitutions were contrary to the said plans and specifications and to said Building Loan Agreement, the value of the said building has been materially lessened, and this plaintiff has been damaged in the further sum of Two Hundred Twenty-eight Thousand, Seven Hundred Twenty-two and 78/100 dollars ($228,722.78), as more particularly set forth in Schedule B hereto annexed and hereby made a part of this complaint. 50

XXXVII. By reason of the defaults of said Central Park Properties, Inc. and the defendants hereinabove set forth, this plaintiff has been damaged in the sum of Seven hundred eighty-eight thousand, six hundred seventy-six and 94/100 dollars ($788,676.94), with interest thereon as hereinafter set forth, in that 51

1. This plaintiff has expended for completing said building to the extent of making the same ready for occupancy, the sum of $166,054.29 with interest thereon from May 1, 1931;

2. Omissions of labor and materials called for by said Building

52 Loan Agreement and said Plans and Specifications and substitutions of inferior materials were made, as more particularly set forth in subdivision marked "XXXVI" hereof to this plaintiff's damage in the sum of $228,722.78
with interest thereon from December 16, 1930;

3. This plaintiff has been deprived of any interest and any return on the sum of Six Million Five Hundred Seventy-Five Thou-
53 sand Dollars ($6,575,000) (being the net amount of principal so loaned by this plaintiff on said building, as hereinabove set forth) from the 5th day of December, 1930 to October 1st; 1931, amounting to the sum of $325,462.50
with interest thereon from October 1, 1931;

4. This plaintiff has expended for fees of supervision in the completion of said building the sum of $ 10,000.00
with interest on $10,000 from May 1, 1931;

54

5. This plaintiff has expended for taxes covering the property on which said building is erected, for the first half of the year, 1931, the sum of $ 38,080.00
with interest thereon from June 1, 1931:

6. This plaintiff has expended for taxes covering the property on which said building is erected, for

the months of July, August and September, 1931, the sum of $ 19,040.00 with interest thereon from December 1, 1931; 55

7. This plaintiff has expended for insurance on the said building the sum of $ 1,317.37 with interest thereon from May 1, 1931.

FOR A SECOND CAUSE OF ACTION:

XXXVIII. This plaintiff repeats and realleges and incorporates as a whole in this cause of action as though the same were here set forth in full, all 56 the allegations hereinabove contained and set forth in subdivisions marked "1" to "XXXV", inclusive, of this complaint.

XXXIX. Heretofore and on or about the 18th day of December, 1930 this plaintiff caused the mortgage referred to in subdivision marked "V" hereof to be foreclosed in an action in the Supreme Court of the State of New York, New York County, entitled, "James T. Harrigan, Plaintiff, against Central Park Properties, Inc., Barclay-Arrow Holding Corporation, Concord Estates, Inc., Abraham E. Lefcourt, Frederick Brown, 57 Manufacturers Trust Company, as Trustee under indenture dated as of April 1st, 1930, The People of the State of New York, Defendants", in which such action such proceedings were had that

1. a judgment of foreclosure and sale was made and entered therein on the 19th day of January, 1931;

2. a sale at public auction was had of the mortgaged premises (being the premises de-

58 scribed in subdivision marked "V" hereof) on the 17th day of March, 1931;

3. at such sale the said mortgaged premises were sold to a nominee of this plaintiff for Six million dollars ($6,000,000);

4. a deficiency judgment was entered, filed and docketed in the New York County Clerk's office in the Sum of Seven hundred sixteen thousand, two hundred fifteen and 2/100 dollars ($716,215.02) on the 30th day of April, 1931 in favor of said James T. Harrigan and against said Central Park Properties, Inc.

59 and in and about said foreclosure proceedings and the entry of said deficiency judgment, said James T. Harrigan represented and was a nominee of, this plaintiff.

XL. If the said building had been completed on or before December 16th, 1930 in accordance with said plans and specifications and said building loan agreement, the value of the mortgaged premises (being the premises described in subdivision marked "V" hereof) would have been so much in excess of Six million, six hundred fifty thousand dollars ($6,650,000) that this plaintiff
60 upon the foreclosure of its mortgage would have realized the full amount of principal and interest due to it on account of said bond and mortgage, over and above the expenses in connection with such foreclosure.

XLI. By reason of the defaults of said Central Park Properties, Inc. and the defendants, hereinabove set forth, and the matters and things hereinabove alleged, this plaintiff has been damaged in the sum of Nine hundred fifty thousand, seven hundred six and 68/100 dollars ($950,-

706.68) with interest thereon as hereinafter set forth, in that 61

1. this plaintiff has expended for completing said building to the extent of making the same ready for occupancy, the sum of $166,054.29 with interest thereon from May 1, 1931;

2. the value of plaintiff's mortgage was impaired to the extent of at least the amount of said deficiency judgment hereinabove set forth, to wit, $716,215.02 with interest thereon from the 17th day of April, 1931; 62

3. this plaintiff has expended for fees of supervision in the completion of said building the sum of $ 10,000.00 with interest on $10,000 from May 1, 1931;

4. this plaintiff has expended for taxes covering the property on which said building is erected, for the first half of the year 1931, the sum of $ 38,080.00 with interest thereon from June 1, 1931; 63

5. this plaintiff has expended for taxes covering the property on which said building is erected, for the months of July, August and September, 1931, the sum of $ 19,040.00 with interest thereon from December 1, 1931;

6. this plaintiff has expended for insurance on the said building the sum of $ 1,317.37 with interest thereon from May 1, 1931.

64 WHEREFORE, plaintiff demands judgment against the defendants and each of them for the sum of Nine hundred fifty thousand, seven hundred six and 68/100 dollars ($950,706.68) together with interest thereon as specified in subdivisions marked "XXXVII" and "XLI" hereof, and also the costs and disbursements of this action.

ALFRED T. DAVIDSON,
Attorney for Plaintiff,
Office & P. O. Address,
2396 Third Avenue,
Borough of Manhattan,
New York City, N. Y.

65 STATE OF NEW YORK, }
COUNTY OF KINGS, } SS.:

FRANK FOX, being duly sworn, deposes and says: I am an officer, to wit, a Vice President of the plaintiff, THE PRUDENCE COMPANY, INC., in the above entitled action. The said plaintiff is a domestic corporation. The foregoing complaint is true to my knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

FRANK FOX.

66 Subscribed and Sworn to before me, }
this 18th day of February, 1932. }

CLARA E. ENGLAND,
CLARA E. ENGLAND,
Notary Public,
Kings County.
Kings Co. Clerk's No. 39, Reg. No. 2043.
Queens Co. Clerk's No. 343, Reg. No. 2331.
N. Y. Co. Clerk's No. 203, Reg. No. 2E144.
Ctf. Filed in Nassau County.
Commission expires March 30, 1932.

67

SCHEDULE A.*
(Original form.)

AMOUNTS PAID BY PLAINTIFF FOR LABOR AND MATERIALS FURNISHED IN COMPLETING THE BUILDING TO THE EXTENT OF MAKING THE SAME READY FOR OCCUPANCY.

1. BLUE PRINTS			$ 258.19
2. CARPENTRY			
(a) Carpenter—labor		$985.70	
(b) Trim bills		$152.13	
			$ 1,137.83
3. CEMENT WORK			
(a) Patching—Labor		$ 27.38	
(b) Materials (estimated)		$ 11.25	
(c) Leveling cement floors		$608.00	
			$ 646.63
4. ELECTRIC			
(a) Missing parts			
Crannell, Nugent and Kranzer, Inc.			
$ 7.75	$12.48	$ 6.88	
11.56	1.20	27.00	
2.52	8.20	13.75	
31.50	28.80	2.80	
2.10	33.58	28.10	
11.14	6.21	21.57	
6.35	23.20	.78	
8.74	78.00	.78	
11.04	9.66	.85	
2.40	34.80	1.69	
8.13	.78	3.95	
			$ 448.29
Rialto Electrical Company			8.40
(b) Fountain—reflectors—			
Heinrich Reflector Co.		$40.50	
Labor		$ 3.50	
			44.00

68

69

* Schedule A was amended at the trial and a revised Schedule A marked as Plaintiff's Exhibit 84 (offered as an exhibit for identification at page 128 and marked in evidence at page 180) was substituted for the original Schedule A printed above. A motion to conform the pleadings to the proof in respect of Schedule A was made and granted at the conclusion of the trial. (*Infra*, page 491.)

Original Schedule A

70 (c) Fire alarm system

Framing cards—		
N. Y. Picture Frame Co.	19.80	
"	1.80	
Printing Fire cards—		
Parkway Printing Co.	6.00	
Recoding—		
Crannell, Nugent & Kranzer, Inc.	8.00	
		$ 35.60

5. ELEVATORS

Finishing original contract—Otis Elevator Co.	$ 14,500.00
Removing equipment to waterproof elevator pits—Otis Elevator Company	$ 380.00

71 6. FIREPROOF WINDOWS

Missing stools and trim—Chapman Metal Products Co. Inc.	$ 1,551.60
Repairing casement windows—S. H. Pomeroy Co. Inc.	$ 125.00

7. FIREPROOF DOORS AND BUCKS

(a) Material for repairing doors—	
Reliance Bronze & Steel Corp.	$ 22.50
Roselait Building Corp.	$ 25.60

9. FLOORS

Refinishing of ballroom floor

72 Builders Wood Flooring Company

3005 sq. ft. at .07¢ $ 210.00

10. GLASS

(a) Replacing mirrors and glass—E. Ossias

$108.02	$149.35	$270.00	
12.00	357.46	167.08	
66.00	26.40	113.50	
54.80	118.79		
			$ 1,443.40

(b) Schwartz & Glasser—glass for bronze screen—1st floor $ 75.00

Original Schedule A

11. HARDWARE

(a) Making master key system, supplying missing keys and repairing locks

O'Byrne & Russell	$ 2.50		73
" " "	118.90		
" " "	65.00		
" " "	6.50		
(b) 240 door stops—O'Byrne & Russell	48.00		
		$ 240.90	
(c) Missing hardware—Rosenthal Hardware Company	$390.00		
Rosenthal Hardware Company	118.70		
		$ 508.70	74
(d) Amount paid to Rosenthal Hardware Company for unattached hardware left in building when taken over		$ 406.01	
(e) Coat and hat hooks—Lockwood Manufacturing Co.		$ 150.00	

12. IRON (ORNAMENTAL)

(a) Access Doors—

Ray, Daisley & Co.		$ 24.00	
Karp Metal Products Co.	$11.25		
" " " "	41.25		
" " " "	9.15		
		$ 61.65	75
(b) Miscellaneous iron work			
Gottlieb Iron Works	$30.00		
" " "	50.00		
" " "	125.00		
" " "	70.68		
		$ 275.68	
Aetna Iron Works		$ 275.00	

Original Schedule A

76 13. LIGHTING FIXTURES

(a) Fixtures purchased from Shapiro & Aronson, Inc. to make up for missing fixtures

	$175.25	
	123.00	
	132.00	
	158.75	
	9.00	
		$ 598.00

(b) Fixtures purchased from Lightolier Company to make up for missing fixtures

77	$93.00	
	12.00	
	17.00	
	6.00	
	68.40	
	2.40	
	42.00	
	39.90	
	28.50	
	12.00	
		$ 321.20

15. MASONRY

78 Patching up brick work on west wall of adjoining building, Hotel Meurice to prevent it from falling and to improve its unsightly appearance
Robert H. Schwartz $ 750.00

16. MISCELLANEOUS

Cleaning—
Windows—Apartment House & Window Cleaning Co. $ 925.00

Original Schedule A

Rubbish removal—			79
William Cox	$35.00		
	56.00		
	84.00		
	77.00		
	189.00		
	119.00		
	266.00		
	142.50		
		$ 968.50	
James E. Graham	$175.00		
	105.00		
		$ 280.00	
17. DAMPROOFING & WATERPROOFING			
(a) Window caulking—Hydro-Bar Corporation		$ 875.00	80
(b) Elevator pits—S. E. Stott & Co. Inc.		$ 225.00	
18. ELECTRIC CURRENT			
United Electric Light & Power Co.			
4/4 to 5/5/1931	$ 31.64		
5/5 to 6/4/1931	834.56		
6/4 to 7/6/1931	1202.32		
7/6 to 8/4/1931	1137.12		
8/4 to 9/2/1931	1872.34		
9/2 to 10/2/1931	2842.44		
		$ 7,920.72	
19. INCINERATOR			81
Tools—Stanton-Murray Corp.		$ 25.00	
20. KITCHEN EQUIPMENT		$ 295.00	
24. TELEPHONE			
May, June, July, August and September 1931—		$ 5,667.59	
27. PAINTING			
Landsman Bros. & Soffin		$ 71,650.00	

Original Schedule A

82 29. REFRIGERATION

(a) Gas mask and cabinet—A. T. Miller Supply Co. $ 21.78

(b) Repairing compressor—Yoss Inc. Machine Works $ 424.71

(c) Missing parts for Electrolux boxes in serving pantries—Consolidated Gas Co. of New York $ 30.14

30. PLASTERING

(a) Patching—labor $ 436.80

(b) Estimated amount of material for above $ 55.00

31. PLUMBING

83 (a) Shower curtains—687 at $2.00 each— $ 1,374.00

Note:—The contract wtih the Acme Curtain Company was for $2.40 each for Rayon Taffeta Curtains, but the plumbing specifications called for white duck, a fair price for which is $2. each.

Shower curtain pins:— $ 428.68

(b) Missing parts—Moylan Supply Co. Inc.

$ 6.00	$ 3.96
4.47	3.96
22.80	24.60
84 3.15	42.00
21.00	31.80
	$ 163.74

(c) Repairing tubs—Burnside Plumbers Specialties Co. $ 28.00

(d) Murray & Sorenson, Inc. (Missing exterior bronze plates) $ 30.00

32. ROOFING AND SHEET METAL

(a) Repairing roof on 32nd floor terrace due to improper workmanship—Primo Roofing Co. $ 54.26

Original Schedule A

33. STEAMFITTING

Insulating ceilings of steam and incinerator rooms—Asbestor Construction Company $ 700.00 85

34. STEAM CONSUMPTION (N. Y. STEAM CORP.)

3/31—4/30/1931	$381.31
4/30—5/29/1931	161.46
5/29—6/30/1931	102.50
6/30—7/31/1931	102.60
7/31—8/31/1931	327.61
8/31—9/30/1931	610.63
	$ 1,686.11

37. KITCHEN CABINETS

Missing hardware—The White Door Bed Company

$ 5.74	86
47.27	
$ 53.01	

38. BRONZE

(a) Contract—Suburban Bronze & Iron Corp., for bronze screen between entrance lobby and dining room and between entrance foyer and lounge, all as shown on original plans $ 1,350.00

(b) Two radiator grilles missing in 59th Street vestibule $ 20.00

(c) Repairing bronze doors to ballroom $ 44.35

39. TERRAZZO

Polishing 1st floor terrazzo— $ 675.28 87

41. PAY ROLLS TO OCTOBER 1, 1931 $ 45,123.44

TOTAL $166,054.29

SCHEDULE B.*

(Original form.)

88

LABOR AND MATERIALS OMITTED AND NOT SUPPLIED BY PLAINTIFF; AND SUBSTITUTIONS BY CENTRAL PARK PROPERTIES, INC. OF MATERIALS INFERIOR TO THOSE CALLED FOR BY PLANS AND SPECIFICATIONS.

2. CARPENTRY

(a) Kellestone Carpet strips — $ 8,450.00

(b) Wood stools and aprons were omitted from 2335 metal windows in rooms from 2nd to 40th floors inclusive, which were specified on page 11, paragraph 39 of the Carpentry and millwork specifications

89

2335 fireproofed wood stools and aprons at $4.00 each—erected	$9,340.00	
2335 metal stools and aprons erected at $1.80 each	$4,203.00	
Difference		$ 5,137.00

(c) Cement base with wood cap moulding was substituted for the 6" one piece wood base specified on page #10, paragraph 33 of the carpentry and millwork specifications and on the schedule of interior finish for 574 foyers, 440 living rooms, 681 bedrooms, and 473 serving pantries from the 2nd to the 40th floors inclusive.

90

6" cement base with wood moulding per ft.	.18¢
6" one member fireproofed wood base, " "	.35¢
Difference	.17¢

Estimated lineal feet 78,388 at .17¢ — $ 13,325.00

4. ELECTRIC

(a) Charts in each panel box — $ 300.00

(b) Unfinished work in barber shop — $ 250.00

* Schedule B was amended at the trial and a revised Schedule B marked as Plaintiff's Exhibit 85 (offered as an exhibit for identification at page 128 and marked in evidence at page 180), was substituted for the original Schedule B printed above. A motion to conform the pleadings to the proof in respect of Schedule B was made and granted at the conclusion of the trial. (*Infra*, page 491.)

Original Schedule B

7. FIREPROOF DOORS AND BUCKS

(a) Copper kalamein roof doors specified, instead of iron kalamein doors now in place—5 at $40.00 — $ 200.00

8. FIREPROOF ARCHES

Fireproofing omitted on floor beams in 21st floor plenum chamber — $ 200.00

10. GLASS

(a) 681 bedroom mirrors—plain instead of beveled as specified; cost of removing, beveling edges, resilvering and resetting at $6.75 each— — $ 4,596.75

(b) Glazed upper panel roof doors. Specified but not furnished—
estimated amount for glass — $ 100.00

(c) Glazed doors on first floor—specified but not furnished.
estimated amount for glass — $ 60.00

11. HARDWARE

Difference between value of hardware actually installed and amount specifications called for as hardware expense — $ 29,500.00

12. IRON (ORNAMENTAL)

Vault door specified for book vault 1st floor—not furnished — $ 150.00

Iron ladder missing to water meter—to be installed —valve — $ 15.00

13. LIGHTING FIXTURES

(a) Difference between value of lighting fixtures actually installed and amount specifications called for as lighting fixture expense — $ 26,900.00

(b) Fixtures missing from 1st floor—estimated cost — $ 850.00

14. MARBLE

Terrazzo installed on lobby floor instead of marble as called for on plans—difference — $ 3,889.50

Original Schedule B

94 15. MASONRY

Brick costing $33.00 per thousand was used instead of the $38.00 per thousand brick specified on page 3, paragraph 5 of the masonry specification.
1,300,000 Continental Fiske brick used at $33.00 per thousand.
Difference in cost $ 6,500.00

16. MISCELLANEOUS

(a) Mantle pieces—an allowance of $150.00 was made on page 9 of the Preliminary and Miscellaneous work specification for each fireplace mantle for each living room from the 18th to the 38th floors inclusive—144 in all, and $250.00 each for the four mantles on the 39th floor. All of these fireplace mantles were omitted. $ 22,600.00

95

21. MAIL CHUTE

Installed, but not paid for; now in use under rental arrangement.
Cost of installation $ 4,000.00

22. MEDICINE CABINETS

Difference between value of medicine cabinets actually installed and amount called for in specifications as medicine cabinet expense $ 4,069.44

25. WIRE GUARDS

96

For machinery in basement—required by statute—not yet purchased—estimated amount $ 300.00

26. CORK FLOORS

Cork floor shown on 40th floor public elevator lobby 364 sq. ft. at .70¢— $ 254.80

27. PAINTING

Difference between amount actually spent and amount which would have been required to comply with plans and specifications $ 19,150.00

Original Schedule B

28. PLANT

97

(a) Ventilation—two additional sections for air filter and charging and cleaning tanks—specified but not purchased— $ 100.00

29. REFRIGERATION

Difference between value of apartment refrigerators actually installed and amount called for in specifications as refrigerator expense $ 7,953.00

30. PLASTERING, FURRING AND LATHING

(a) No plastering done in barber shop—estimated amount— $ 750.00

98

(b) Paragraph 20 on page 10 of the plastering specification and schedule sheet #14 calls for wainscot of Keene's Cement 4'6" high in all service elevator vestibules and lobbies throughout the building. No Keene's cement wainscots were put in any of these spaces
1222 yards at $4.77 (removing existing plaster and applying Keene's cement) $ 5,828.94

31. PLUMBING

The following items are called for in the specification but were never furnished or installed:—

99

Perforated hush pipes in house tank discharge line	$ 50.00
Gas shut-off valve	150.00
Pressure gauges on water meter	50.00
1—6" check valve omitted on water meter	125.00
Gauges on discharge of house pumps	100.00
Liquid soap dispenser system	300.00
Two Siamese connections	60.00
Five lavatories omitted in barber shop	625.00
Valve charts	300.00
	$ 1,760.00

Original Schedule B

100 32. ROOFING AND SHEET METAL

Amount required by the Fordham Cornice works, original roofing contractor, to furnish the guarantee called for in the specification.	$ 500.00
Copper louvres and screens were omitted from the main stack on the main bulkhead roof	$ 280.00

33. STEAMFITTING

(a) Radiators omitted in all stores	$ 700.00
(b) Valve charts and brass tags omitted	$ 375.00
(c) One years supply of gauge charts	$ 25.00
(d) Radiators omitted in interior bathrooms—estimate of Chas. H. Darmstadt, Inc.—	$ 25,000.00
101 Cost of cutting and patching plaster and tile work to install above	$ 17,000.00
(e) Rubbish chute, called for in specification,—omitted	$ 4,500.00

35. TERRA COTTA

Caps missing from end piers on north and south terraces, 1st bulkhead	$ 275.00

36. TILE

(a) Barber shop—floor and wall tile omitted	$ 2,022.00
(b) Soap dishes installed over wash basins in guest	
102 baths instead of combination soap, glass and toothbrush holders	$ 1,030.00
(c) Fixtures omitted over lavatories in servants rooms	$ 191.75

38. BRONZE WORK

Bronze screens omitted from lobby floor	$ 1,650.00
Glass for above	$ 525.00

Original Schedule B

39. TERRAZZO

1395 sq. ft. of terrazzo on 1st floor not polished at .08¢ per sq. ft. $ 111.60

40. CABINET WORK

(a) Racks and shelving omitted in check room, 1st floor $ 150.00

(b) Room clerks office—mail and key racks and shelving omitted $ 1,200.00

(c) File racks and 4 wood screens on counters of desk space in main lobby omitted $ 550.00

(d) Telephone room—counter and phone booths omitted $ 1,350.00

(e) Private dining rooms 1st floor—wood folding doors omitted $ 1,158.00

(f) Teak and burl wall paneling was omitted from behind the desk space, cashiers space and news and ticket stand $ 2,940.00

Total $228,722.78

Original Answer, Verified April 29, 1932.*

106 UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

THE PRUDENCE COMPANY, INC.,
Plaintiff,

against

FIDELITY AND DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE,
Defendants.

The defendants, by their attorney, Thomas E. White, answering the complaint herein:

107 FIRST: Admit that on or about the 24th day of September, 1929, the plaintiff and Central Park Properties, Inc., entered into a certain building loan agreement, and that said building loan agreement contained numerous terms, conditions and provisions, for the exact wording and purport of which the defendants refer to the original thereof when produced by the plaintiff upon the trial of this action but, except as herein specifically admitted, upon information and belief, deny each and every allegation contained in paragraphs V, VI, VII and VIII of the complaint.

108 SECOND: Admit that on or about the 25th day of September, 1929, Central Park Properties, Inc., as principal and the defendants as sureties executed and delivered to the plaintiff their surety bond in the amount of $3,000,000, for the exact terms, conditions and provisions of which the defendants beg leave to refer to the original thereof

* By order of the District Court (Hon. WILLIAM BONDY, *D.J.*) dated February 17, 1933 (*Infra*, page 536), a motion to strike out certain defenses in the original answer was granted, with leave to the defendant to serve an amended answer. The original answer above was thereafter superseded by an amended answer verified March 2, 1933 (*Infra*, page 47).

when produced by the plaintiff upon the trial of 109
this action but, except as herein specifically admitted, upon information and belief, deny each and every allegation contained in paragraphs IX, XII, XIII, XIV, XV and XVI of the complaint.

THIRD: Deny any knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph X of the complaint.

FOURTH: Admit that prior to the 16th day of December, 1930, the plaintiff advanced to Central Park Properties, Inc., at various times and in various amounts the sum of $6,650,000 of which 110
the sum of $75,000 was deposited by Central Park Properties, Inc., for plaintiff and was thereafter appropriated by plaintiff for payment on account of said $6,650,000 but, except as herein specifically admitted, upon information and belief, deny each and every allegation contained in paragraphs XVII and XVIII of the complaint.

FIFTH: Deny any knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph XIX of the complaint.

SIXTH: Upon information and belief, deny each 111
and every allegation contained in paragraphs XX, XXI, XXII, XXIII and XXIV of the complaint.

SEVENTH: Admit that the defendants have not paid to the plaintiff any monies under and by virtue of the said surety bond but, except as herein specifically admitted, upon information and belief, deny each and every allegation contained in paragraphs XXV, XXVI and XXVII of the complaint.

EIGHTH: Admit that the plaintiff notified the defendants of certain alleged defaults in the per-

112 formance of the obligations contained in the bond and of certain alleged defaults of Central Park Properties, Inc., and that the said building was alleged to be not completed in accordance with the building loan agreement and the plans and specifications but, except as herein specifically admitted, upon information and belief, deny each and every allegation contained in paragraphs XXVIII, XXIX and XXX of the complaint.

NINTH: Admit that plaintiff has demanded that the defendants remedy certain claimed defaults of Central Park Properties, Inc., and that defen-
113 dants have not remedied said alleged defaults but, except as herein specifically admitted, upon information and belief, deny each and every allegation contained in paragraphs XXXI and XXXII of the complaint.

TENTH: Upon information and belief, deny each and every allegation contained in paragraphs XXXIII, XXXIV, XXXV, XXXVI and XXXVII of the complaint.

ELEVENTH: Deny any knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph
114 XXXIX of the complaint.

TWELFTH: Upon information and belief, deny each and every allegation contained in paragraphs XL and XLI of the complaint.

FOR A FIRST SEPARATE, DISTINCT AND COMPLETE DEFENSE DEFENDANTS ALLEGE, UPON INFORMATION AND BELIEF:

THIRTEENTH: That the building loan agreement entered into between the plaintiff and Central Park Properties, Inc., provided that the building

to be erected by Central Park Properties, Inc., should be completed and ready for occupancy not later than December 16, 1930. 115

FOURTEENTH: That on the 5th day of December, 1930, the building was in such condition that it would have required a sum in excess of $170,000 to complete the same and make it ready for occupancy, and there were omissions of labor and materials from and substitutions of inferior materials in said building amounting in value to a sum in excess of $230,000.

FIFTEENTH: That on the said 5th day of December, 1930, the plaintiff had knowledge of the facts alleged in paragraph Fourteenth of this answer. 116

SIXTEENTH: That on the said 5th day of December, 1930, the plaintiff had advanced to Central Park Properties, Inc., all of the monies which it agreed to advance under said building loan agreement except the sum of $300,000.

SEVENTEENTH: That on the said 5th day of December, 1930, the plaintiff made a final payment of the said sum of $300,000 to Central Park Properties, Inc.

EIGHTEENTH: That the payment by said plaintiff of the said sum of $300,000 was a breach of the duty owing by the plaintiff to the defendants and by reason thereof the liability of the defendants under their bond was released and discharged. 117

FOR A SECOND SEPARATE, DISTINCT AND COMPLETE DEFENSE DEFENDANTS ALLEGE, UPON INFORMATION AND BELIEF:

NINETEENTH: That the terms and provisions of the building loan agreement entered into between

118 the plaintiff and Central Park Properties, Inc., were made a part of the bond of the defendants by reference.

TWENTIETH: That said building loan agreement provided that the plaintiff would make a first advance of the sum of $3,250,000 at the time of closing, and that as to the remaining $3,250,000 all subsequent advances except the final one would be made by the plaintiff on the basis of 75% of the value of the labor and materials installed and incorporated in the construction of the building, and that the other 25% would be paid to Central
119 Park Properties, Inc., as a final advance.

TWENTY-FIRST: That the said building loan agreement further provided that no advance would be due and payable unless all work usually done at the stage of construction when the advance was applied for had been done in a good and workmanlike manner and all materials and fixtures usually furnished and installed at such stage of construction had been furnished and installed.

TWENTY-SECOND: That on the 5th day of December, 1930, the plaintiff had in its possession as and for the final advance only the sum of $300,000
120 instead of the sum of $812,500, and that on said date the plaintiff made the final advance of $300,000 to Central Park Properties, Inc., although, to the knowledge of plaintiff, all work usually done at that stage had not been done in a good and workmanlike manner and all the materials and fixtures usually furnished and installed at such stage had not been furnished and installed.

TWENTY-THIRD: That by reason thereof, the liability of the defendants under their bond was released and discharged.

FOR A THIRD SEPARATE, DISTINCT AND COMPLETE DEFENSE DEFENDANTS ALLEGE, UPON INFORMATION AND BELIEF: 121

TWENTY-FOURTH: That the building loan agreement entered into between the plaintiff and Central Park Properties, Inc., provided that the building to be erected by Central Park Properties, Inc., should be completed and ready for occupancy not later than December 16, 1930.

TWENTY-FIFTH: That on December 5, 1930, the plaintiff owed to the defendants the duty of reserving sufficient of the monies then in its possession to assure the completion of said building. 122

TWENTY-SIXTH: That on the 5th day of December, 1930, the sum of $300,000 would have been sufficient money with which to complete said building and make it ready for occupancy.

TWENTY-SEVENTH: That on the 5th day of December, 1930, the plaintiff had the sum of $300,000 in its possession and it delivered the same to Central Park Properties, Inc.

TWENTY-EIGHTH: That by reason thereof, the liability of the defendants under their bond was thereby released and discharged. 123

FOR A FOURTH SEPARATE, DISTINCT AND COMPLETE DEFENSE DEFENDANTS ALLEGE, UPON INFORMATION AND BELIEF:

TWENTY-NINTH: That the bond executed and delivered by the defendants to the plaintiff expressly provided that the plaintiff would deliver to the defendants written notice of any default by Central Park Properties, Inc., within thirty

124 days after two executive officers of plaintiff should have actual notice thereof.

THIRTIETH: That on or about the 16th day of December, 1930, two executive officers of plaintiff had actual notice of the default of Central Park Properties, Inc., in not completing said building and making it ready for occupancy, and that the plaintiff failed to give to the defendants written notice of such default as provided by the bond.

THIRTY-FIRST: That by reason thereof, the liability of the defendants under said bond was released and discharged.

125

FOR A FIFTH SEPARATE, DISTINCT AND COMPLETE DEFENSE DEFENDANTS ALLEGE, UPON INFORMATION AND BELIEF:

THIRTY-SECOND: That the bond executed by defendants and delivered to the plaintiff provided that the plaintiff would retain from the total amount agreed to be advanced by the plaintiff to Central Park Properties, Inc., sufficient money with which the building might be completed in the event of the default of Central Park Properties, Inc., and the plaintiff agreed that in the event of
126 any such default it would place at the disposal of the defendants such unadvanced amounts of money as would have been receivable by Central Park Properties, Inc., if the latter had not committed any default.

THIRTY-THIRD: That on the 16th day of December, 1930, Central Park Properties, Inc., had defaulted in the performance of its agreement with the plaintiff in that the building was not then completed and ready for occupancy.

THIRTY-FOURTH: That on the said 16th day of December, 1930, there were no monies in the hands of the plaintiff which were applicable to the completion of said building. 127

THIRTY-FIFTH: That by reason of the premises the liability of the defendants under their bond was released and discharged.

FOR A SIXTH SEPARATE, DISTINCT AND COMPLETE DEFENSE DEFENDANTS ALLEGE, UPON INFORMATION AND BELIEF:

THIRTY-SIXTH: That on the 5th day of December, 1930, the plaintiff and Central Park Properties, Inc., agreed that all the work required for the completion of the building provided for in the building loan agreement had been done except work which could be completed for the sum of $75,000. 128

THIRTY-SEVENTH: That on the said 5th day of December, 1930, and at the time the said agreement was made the plaintiff made to Central Park Properties, Inc., a final advance of $300,000, and the Central Park Properties, Inc., deposited with the plaintiff the sum of $75,000, being the maximum amount required for the completion of the building. 129

THIRTY-EIGHTH: That by reason thereof, the liability of the defendants on their bond was released and discharged.

FOR A SEVENTH SEPARATE, DISTINCT AND COMPLETE DEFENSE DEFENDANTS ALLEGE, UPON INFORMATION AND BELIEF:

THIRTY-NINTH: That the building loan agreement entered into between the plaintiff and Cen-

130 tral Park Properties, Inc., provided that the final advance would not be due and payable until Central Park Properties, Inc., had obtained and delivered to the plaintiff a certificate of completion issued by the Building Department of the City of New York.

FORTIETH: That on the 5th day of December, 1930, the plaintiff made to Central Park Properties, Inc., the final advance under said building loan agreement in the sum of $300,000.

FORTY-FIRST: That at the time of said payment no certificate of completion had been obtained
131 from the Building Department of the City of New York and delivered to the plaintiff.

FORTY-SECOND: That by reason thereof, the liability of the defendants under their bond was released and discharged.

FOR AN EIGHTH SEPARATE, DISTINCT AND COMPLETE DEFENSE DEFENDANTS ALLEGE, UPON INFORMATION AND BELIEF:

FORTY-THIRD: That the building loan agreement entered into between the plaintiff and Central Park Properties, Inc., provided that all ad-
132 vances by plaintiff to Central Park Properties, Inc., would be made after application by Central Park Properties, Inc., which application should set forth the work incorporated to the date of the application, together with the cost of each item.

FORTY-FOURTH: That the plaintiff failed to comply with said provision and made advances without obtaining information as to the work incorporated and its cost.

FORTY-FIFTH: That by reason thereof, the liability of the defendants under their bond was released and discharged. 133.

FOR A NINTH SEPARATE, DISTINCT AND PARTIAL DEFENSE DEFENDANTS ALLEGE, UPON INFORMATION AND BELIEF:

FORTY-SIXTH: ~~Reiterates~~ and realleges paragraphs Thirty-sixth and Thirty-seventh of this answer.

FORTY-SEVENTH: That the said $75,000 should have been applied by the plaintiff to the completion of the said building, but instead thereof the plaintiff applied said sum on account of the principal or interest which became due on a mortgage of the Central Park Properties, Inc., to the plaintiff. 134

FOR A TENTH SEPARATE, DISTINCT AND PARTIAL DEFENSE DEFENDANTS ALLEGE, UPON INFORMATION AND BELIEF:

FORTY-EIGHTH: That the omissions of items and the substitutions of inferior materials as alleged in paragraph XXXVI of the complaint were made with the knowledge and approval of the plaintiff. 135

FORTY-NINTH: That by reason thereof, as to such omissions and substitutions, the plaintiff waived strict performance of the terms and provisions of the building loan agreement and of the plans and specifications, and the plaintiff is estopped to allege that the said omissions and the said substitutions were contrary to the said plans and specifications and to said building loan agreement.

136 WHEREFORE, the defendants demand judgment dismissing the complaint with costs.

THOMAS E. WHITE,
Attorney for Defendants,
55 Liberty Street,
New York, N. Y.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

THOMAS P. CUMMINGS, being duly sworn, deposes and says that he has read the foregoing answer and knows the contents thereof, and that
137 the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true; that the reason this verification is made by deponent and not by the defendants herein, is because the said defendants are corporations and deponent is an officer of one of the defendants, Fidelity and Deposit Company of Maryland, to wit, its Assistant Secretary.

THOMAS P. CUMMINGS.

Sworn to before me, this }
138 29th day of April, 1932. }

ANN S. BRANVALL,
Notary Public,
Queens County No. 2574,
Cert. filed in N. Y. Co.

* Amended Answer, Verified March 2, 1933.

UNITED STATES DISTRICT COURT, 139
SOUTHERN DISTRICT OF NEW YORK.

THE PRUDENCE COMPANY, INC.,
Plaintiff,

against

FIDELITY AND DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE,
Defendants.

The defendants, by their attorney, Thomas E. White, answering the complaint herein by their amended answer allege: 140

FIRST: Admit that on or about the 24th day of September, 1929, the plaintiff and Central Park Properties, Inc., entered into a certain building loan agreement, and that said building loan agreement contained numerous terms, conditions and provisions, for the exact wording and purport of which the defendants refer to the original thereof when produced by the plaintiff upon the trial of this action but, except as herein specifically admitted, upon information and belief, deny each and every allegation contained in paragraph VIII of the complaint. 141

SECOND: Admit that on or about the 25th day of September, 1929, Central Park Properties, Inc., as principal and the defendants as sureties executed and delivered to the plaintiff their surety bond in the amount of $3,000,000, for the exact terms, conditions and provisions of which the

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*(Original amended answer bears the following notation by Clerk):

Note:—See Order filed 7/29/33, granting motion to strike out 2nd, 3rd, 5th and 6th defenses in amended answer, denying motion to strike out 1st defense in amended answer, and withdrawing motion to strike out 4th defense in amended answer (Order signed by Bondy, J.).

142 defendants beg leave to refer to the original thereof when produced by the plaintiff upon the trial of this action, but, except as herein specifically admitted, upon information and belief, deny each and every allegation contained in paragraph IX of the complaint.

THIRD: Admit that prior to the 16th day of December, 1930, the plaintiff advanced to Central Park Properties, Inc., at various times and in various amounts the sum of $6,650,000 of which the sum of $75,000 was deposited by Central Park Properties, Inc., with plaintiff and was thereafter
143 appropriated by plaintiff for payment on account of said $6,650,000 but, except as herein specifically admitted, upon information and belief, deny each and every allegation contained in paragraphs XVII and XVIII of the complaint.

FOURTH: Upon information and belief, deny each and every allegation contained in paragraphs XIX, XX, XXI, XXII, XXIII and XXIV of the complaint.

FIFTH: Admit that the defendants have not paid to the plaintiff any monies under and by virtue of the said surety bond but, except as here-
144 in specifically admitted, upon information and belief, deny each and every allegation contained in paragraphs XXV, XXVI and XXVII of the complaint.

SIXTH: Admit that the plaintiff notified the defendants of certain alleged defaults in the performance of the obligations contained in the bond and of certain alleged defaults of Central Park Properties, Inc., and that the said building was alleged to be not completed in accordance with the

building loan agreement and the plans and specifications but, except as herein specifically admitted, upon information and belief, deny each and every allegation contained in paragraphs XXVIII, XXIX and XXX of the complaint. 145

SEVENTH: Admit that plaintiff has demanded that the defendants remedy certain claimed defaults of Central Park Properties, Inc., and that defendants have not remedied said alleged defaults but, except as herein specifically admitted, upon information and belief, deny each and every allegation contained in paragraphs XXXI and XXXII of the complaint.

146

EIGHTH: Upon information and belief, deny each and every allegation contained in paragraphs XXXIII, XXXIV, XXXV, XXXVI and XXXVII of the complaint.

NINTH: Deny any knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph XXXIX of the complaint.

TENTH: Upon information and belief, deny each and every allegation contained in paragraphs XL and XLI of the complaint.

147

FOR A FIRST SEPARATE, DISTINCT AND COMPLETE DEFENSE DEFENDANTS ALLEGE, UPON INFORMATION AND BELIEF:

ELEVENTH: That the building loan agreement entered into between the plaintiff and Central Park Properties, Inc., provided that the building to be erected by Central Park Properties, Inc., should be completed and ready for occupancy not later than December 16, 1930.

148 TWELFTH: That on the 5th day of December, 1930, the building was in such condition that it would have required a sum in excess of $170,000 to complete the same and make it ready for occupancy, and there were omissions of labor and materials from and substitution of inferior materials in said building amounting in value to a sum in excess of $230,000.

THIRTEENTH: That on the said 5th day of December, 1930, the plaintiff had knowledge of the facts alleged in paragraph Twelfth of this answer.

FOURTEENTH: That on the said 5th day of
149 December, 1930, the plaintiff had advanced to Central Park Properties, Inc., all of the monies which it agreed to advance under said building loan agreement except the sum of $300,000.

FIFTEENTH: That on the said 5th day of December, 1930, the plaintiff made said final payment of $300,000 although it was advised and knew that Central Park Properties, Inc. would be unable to complete the building in accordance with the terms of the contract and that it would necessarily have to default.

150 SIXTEENTH: That the payment by said plaintiff of the said sum of $300,000 was made in bad faith and in absolute disregard of the rights of the defendants, and by reason thereof the liability of the defendants under their bond was released and discharged.

FOR A SECOND SEPARATE, DISTINCT AND COMPLETE DEFENSE DEFENDANTS ALLEGE, UPON INFORMATION AND BELIEF:

SEVENTEENTH: That the terms and provisions of the building loan agreement entered into be-

tween the plaintiff and Central Park Properties, Inc., were made a part of the bond of the defendants by reference. 151

EIGHTEENTH: That said building loan agreement provided that the plaintiff would make a first advance of the sum of $3,250,000 at the time of closing, and that as to the remaining $3,250,000 all subsequent advances except the final one would be made by the plaintiff on the basis of 75% of the value of the labor and materials installed and incorporated in the construction of the building, and that the other 25% would be paid to Central Park Properties, Inc., as a final advance. 152

NINETEENTH: That the said building loan agreement further provided that no advance would be due and payable unless all work usually done at the stage of construction when the advance was applied for had been done in a good and workmanlike manner and all materials and fixtures usually furnished and installed at such stage of construction had been furnished and installed.

TWENTIETH: That on the 5th day of December, 1930, the value of labor and materials still remaining to be installed and incorporated in the construction of the building was in excess of the sum of $400,000. 153

TWENTY-FIRST: That on the said 5th day of December, 1930, the value of the labor and materials at that time installed and incorporated in the construction of the building was approximately $2,850,000 and 75% of said $2,850,000 is $2,137,500.

TWENTY-SECOND: That if the plaintiff had complied with the terms of the building loan agree-

154 ment, it would have had in its possession a sum in excess of $1,000,000 applicable to the completion of the said building, the payment of all interests, taxes, insurance, fees of supervision and other expenses and sufficient in addition thereto to satisfy any deficiency judgment arising out of the foreclosure of the mortgage.

TWENTY-THIRD: That on the said 5th day of December, 1930, the plaintiff made a final advance of the sum of $300,000.

TWENTY-FOURTH: That by reason of the failure of the plaintiff to comply with the terms of the
155 said building loan agreement, upon the default of Central Park Properties, Inc., there was no money in the possession of the plaintiff with which to complete the said building and the defendants have been damaged to the sum of $404,777.07, the cost of completion.

TWENTY-FIFTH: That by reason of the premises the defendants were prejudiced in that if the plaintiff had complied with the provisions of the building loan agreement and had not been negligent, there would have been in the hands of the plaintiff sufficient to satisfy all of the claims for
156 which this suit is instituted.

TWENTY-SIXTH: That by reason thereof, the liability of the defendants under their bond was released and discharged.

FOR A THIRD SEPARATE, DISTINCT AND COMPLETE DEFENSE DEFENDANTS ALLEGE, UPON INFORMATION AND BELIEF:

TWENTY-SEVENTH: That the building loan agreement entered into between the plaintiff and Cen-

tral Park Properties, Inc., provided that the building to be erected by Central Park Properties, Inc., should be completed and ready for occupancy not later than December 16, 1930. 157

TWENTY-EIGHTH: That on December 5, 1930, the plaintiff owed to the defendants the duty of reserving sufficient of the monies then in its possession to assure the completion of said building.

TWENTY-NINTH: That on the 5th day of December, 1930, the sum of $300,000 would have been sufficient money with which to complete said building and make it ready for occupancy, and that on said day the plaintiff had the sum of $300,000 in 158 its possession.

THIRTIETH: That on the said 5th day of December, 1930, the plaintiff paid to Central Park Properties, Inc., the said sum of $300,000 being the last of the money in the possession of the plaintiff available for Central Park Properties, Inc., under the terms of the building loan agreement.

THIRTY-FIRST: That plaintiff made said payment of $300,000 although it well knew that the building would not be completed in accordance with the terms of the contract, that Central Park Properties, Inc., was then in a bad financial condition 159 and would default on its contract.

THIRTY-SECOND: That by reason thereof, the liability of the defendants under their bond was thereby released and discharged.

FOR A FOURTH SEPARATE, DISTINCT AND PARTIAL DEFENSE DEFENDANTS ALLEGE, UPON INFORMATION AND BELIEF:

THIRTY-THIRD: That the bond executed and delivered by the defendants to the plaintiff expressly

160 provided that the plaintiff would deliver to the defendants written notice of any default by Central Park Properties, Inc., within thirty days after two executive officers of plaintiff should have actual notice thereof.

THIRTY-FOURTH: That on or about the 16th day of December, 1930, two executive officers of plaintiff had actual notice of the default of Central Park Properties, Inc., in not completing said building and making it ready for occupancy, and that the plaintiff failed to give to the defendants written notice of such default as provided by the
161 bond.

THIRTY-FIFTH: That by reason thereof the defendants were damaged in an amount which they are unable at this time to state definitely but which they believe to be in the sum of approximately $400,000.

FOR A FIFTH SEPARATE, DISTINCT AND COMPLETE DEFENSE DEFENDANTS ALLEGE, UPON INFORMATION AND BELIEF:

THIRTY-SIXTH: That on the 5th day of December, 1930, the plaintiff and Central Park Properties, Inc., agreed that all the work required for
162 the completion of the building provided for in the building loan agreement had been done except work which could be completed for the sum of $75,000.

THIRTY-SEVENTH: That on the said 5th day of December, 1930, and at the time the said agreement was made the plaintiff made to Central Park Properties, Inc., a final advance of $300,000, and the Central Park Properties, Inc., deposited with

the plaintiff the sum of $75,000, being the maximum amount required for the completion of the building. 163

THIRTY-EIGHTH: That by reason thereof, the liability of the defendants on their bond was released and discharged.

FOR A SIXTH SEPARATE, DISTINCT AND PARTIAL DEFENSE TO THE FIRST CAUSE OF ACTION SET UP IN THE COMPLAINT DEFENDANTS ALLEGE, UPON INFORMATION AND BELIEF:

THIRTY-NINTH: Reiterates and realleges paragraphs Thirty-sixth and Thirty-seventh of this amended answer. 164

FORTIETH: That the said $75,000 should have been applied by the plaintiff to the completion of the said building, but instead thereof the plaintiff applied said sum on account of the principal or interest which became due on a mortgage of the Central Park Properties, Inc., to the plaintiff.

FOR A SEVENTH SEPARATE, DISTINCT AND PARTIAL DEFENSE DEFENDANTS ALLEGE, UPON INFORMATION AND BELIEF:

FORTY-FIRST: That the omissions of items and the substitutions of inferior materials as alleged in paragraph XXXVI of the complaint were made with the knowledge and approval of the plaintiff. 165

FORTY-SECOND: That by reason thereof, as to such omissions and substitutions, the plaintiff waived strict performance of the terms and provisions of the building loan agreement and of the plans and specifications, and the plaintiff is estopped to allege that the said omissions and the said

166 substitutions were contrary to the said plans and specifications and to said building loan agreement.

WHEREFORE, the defendants demand judgment dismissing the complaint with costs.

THOMAS E. WHITE,
Attorney for Defendants,
55 Liberty Street,
New York, N. Y.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

167 ANDREW G. SCHNEIDER, being duly sworn, deposes and says that he has read the foregoing amended answer and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true; that the reason this verification is made by deponent and not by the defendants herein, is because the said defendants are corporations and deponent is an officer of one of the defendants, Fidelity and Deposit Company of Maryland, to wit, its Assistant Secretary.

168 ANDREW G. SCHNEIDER.
Asst. Secy. T. E. W.

Sworn to before me, this }
2nd day of March, 1933. }

ANNA S. BRANVALL,
Notary Public.

Amendment to Amended Answer, Verified May 10, 1934.

169

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THE PRUDENCE COMPANY, INC.,

Plaintiff,

against

FIDELITY AND DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE,

Defendants.

170

The defendants, by their attorney, Thomas E. White, for a first separate, distinct and complete defense to the complaint herein allege, upon information and belief:

ELEVENTH: That the building loan agreement entered into between the plaintiff and Central Park Properties, Inc., provided that the building to be erected by Central Park Properties, Inc., should be completed and ready for occupancy not later than December 16, 1930.

TWELFTH: That prior to the 5th day of December, 1930, the plaintiff had advanced to Central Park Properties, Inc., all of the monies which it had agreed to advance under the terms of said building loan agreement except the sum of $300,000, and that on the said 5th day of December, 1930, the plaintiff made a final payment of $300,000 to Central Park Properties, Inc. 171

THIRTEENTH: That on the said 5th day of December, 1930, and prior to the making of said payment of $300,000 the plaintiff had as great knowl-

172 edge as it now has knowledge of the condition of the building which the Central Park Properties, Inc., had agreed to erect as regards the details in which said building was still incomplete and as regards any claimed omissions of labor and materials from and substitution of inferior materials in said building.

FOURTEENTH: That on the said 5th day of December, 1930, and prior thereto the plaintiff knew that Central Park Properties, Inc., had been in default in its obligations to the contractors who had furnished labor and materials in the erection
173 of said building and that the said Central Park Properties, Inc., would be unable to complete the building in strict accordance with the terms of the building loan agreement.

FIFTEENTH: That knowing the details of incompletion and omissions and substitutions in said building the payment by said plaintiff of the said sum of $300,000 with the intention thereafter of claiming against these defendants was made in bad faith and in absolute disregard of the rights of the defendants and that by reason thereof the liability of the defendants under their bond was
174 released and discharged.

THOMAS E. WHITE,
Attorney for Defendants,
99 John Street,
New York, N. Y.

Amendment to Amended Answer

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.: 175

ANDREW G. SCHNEIDER, being duly sworn, deposes and says that he has read the foregoing amended answer and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true; that the reason this verification is made by deponent and not by the defendants herein, is because the said defendants are corporations and deponent is an officer of one of the defendants, Fidelity and Deposit 176
Company of Maryland, to wit, its Assistant Secretary.

ANDREW G. SCHNEIDER,
Asst. Secy.

Sworn to before me, this }
10th day of May, 1934. }

ANN S. PRANVALL,
Notary Public, Queens Co. No. 2733, Reg. No. 6604.
Cert, filed N. Y. Co. No. 943, Reg. No. 5B573.
Cert. filed Kings Co. No. 97, Reg. No. 5424. 177
Cert. filed Bronx Co. No. 56, Reg. No. 190B35.
Cert. filed Nassau Co. Clerk's Office.
Cert. filed Richmond Co. Clerk's Office.
Cert. filed West Co. Clerk's Office Reg. Office.
Commission expires March 30, 1935.

Extract from Clerk's Minutes.

178

At a stated Term of the District Court of the United States for the Southern District of New York, held at the United States Court Room, in the United States Court House and Post Office Building in the Borough of Manhattan, City of New York, on the 4th day of May in the year of Our Lord One thousand nine hundred and thirty-four.

Present: Hon. CLARENCE G. GALSTON,
District Judge.

179

[L-52-110—Calendar #837]

THE PRUDENCE COMPANY, INC.,
Plaintiff,

against

FIDELITY AND DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE,
Defendants.

Now comes the plaintiff, by Alfred T. Davison, by Martin A. Schenck, Orrin G. Judd and Ralph
180 C. Williams, Jr., of Counsel, and moves the trial of this Court. Likewise comes the defendants, by Mr. Thomas E. White by Mr. Joseph F. Murray, of Counsel.

Thereupon a jury of one is duly empaneled and sworn, and the cause proceeds to trial. It is stipulated by counsel for both parties that this cause be tried by a jury of one. Trial began and continued, 7th, 8th, 9th, 10th, 11th, 14th and 15th. Counsel for defendants moves to amend the answer. Denied. Same motion renewed. Granted on condition.

Extract from Clerk's Minutes.

Same counsel moves to amend first defense in 181
answer. Granted.

Counsel for plaintiff moves to dismiss amended defense. Denied, exception.

Counsel for defendants moves to dismiss complaint. Denied, exception.

Counsel for defendants moves to dismiss complaint. Again denied, exception.

Counsel for plaintiff moves to direct a verdict. Denied, exception.

The court then having heard all the witnesses, examined the exhibits and heard each counsel in final argument. The case is submitted. Briefs by the 22nd inst. 182

An extract of the minutes.

CHARLES WEISER,
Clerk.

Judgment.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[L 52—110]

THE PRUDENCE COMPANY, INC., 183
Plaintiff,

against

FIDELITY AND DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE,
Defendants.

The issues in the above entitled action having been duly brought on for trial and tried before Hon. Clarence G. Galston and a jury of one, at a

Judgment

184 Stated Term of this Court, held in and for the Southern District of New York, at the Post Office Building, in the City of New York, in said District, on the 7th, 8th, 9th, 10th, 11th, 14th and 15th days of May, 1934, and a verdict having been duly directed on the 6th day of June, 1934, in favor of The Prudence Company, Inc., plaintiff, against the defendants Fidelity and Deposit Company of Maryland and American Bonding Company of Baltimore, in the amount of Seven hundred ninety-eight thousand four hundred sixteen and 81/100 dollars ($798,416.81), with interest from May 15, 1934, and the parties thereupon and on the 7th
185 day of June, 1934, having stipulated, and the Court thereon having ordered, that the verdict be reduced from said sum of Seven hundred ninety-eight thousand four hundred sixteen and 81/100 dollars ($798,416.81) to the sum of Seven hundred seventy-seven thousand nine hundred thirty-four and 54/100 dollars ($777,934.54), with interest from May 15, 1934,

Now, on motion of Alfred T. Davison, attorney for plaintiff,

It is Adjudged that this plaintiff recover of said
186 defendants the sum of Seven hundred seventy-seven thousand nine hundred thirty-four and 54/100 dollars ($777,934.54), with interest thereon from May 15, 1934, to the date hereof in the sum of $3,760.02, amounting in all to the sum of $781,694.56, and that the plaintiff have execution against the defendants therefor.

Judgment signed this 14th day of June, 1934.

CHARLES WEISER,
Clerk.

Stipulation for Reduction of Verdict.

UNITED STATES DISTRICT COURT, 187
SOUTHERN DISTRICT OF NEW YORK.
[L-52-110]

THE PRUDENCE COMPANY, INC.,
Plaintiff,
against
FIDELITY AND DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE,
Defendants.

It is hereby stipulated that the amount of the verdict herein may be reduced from $798,416.81 188
to the sum of $777,934.54 by the elimination of the item of $17,000, together with interest thereon in the amount of $3,482.17, said item being on Plaintiff's Exhibit 85, Item 33-(e), "Cost of cutting and patching plaster and tile work to install same $17,000", such elimination being consequent upon the elimination of the item referred to in the Court's opinion on Plaintiff's Exhibit 85, Item 33-(d), "Radiators omitted in 568 interior bathrooms $25,000".

It is further stipulated that this reduction of the verdict is without prejudice to either side in 189
any other respect to attack or appeal from the verdict and the order and judgment to be entered thereon.

Dated: New York, June 7, 1934.

ALFRED T. DAVISON
Attorney for Plaintiff.

THOMAS E. WHITE,
Attorney for Defendants.

So ordered:
CLARENCE G. GALSTON,
U. S. D. J.

Bill of Exceptions.

190

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

THE PRUDENCE COMPANY, INC., *Plaintiff,*
vs.
FIDELITY & DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE, *Defendants.*
} L 52—110.

191

BE IT REMEMBERED that on the 4th day of May, 1934, this cause came on for hearing before the Hon. CLARENCE G. GALSTON, District Judge, and a jury of one, empanelled and sworn pursuant to stipulation of the parties made in open court, and reduced to writing in the stipulation dated May 7, 1934, and the following proceedings were had on May 4, 7, 8, 9, 10, 11, 14 and 15, to wit:

Appearances:

ALFRED T. DAVISON, Esq., Attorney for Plaintiff; by MARTIN A. SCHENCK, Esq., ORRIN G. JUDD, Esq., and RALPH C. WILLIAMS, Esq., of Counsel.

192

THOMAS E. WHITE, Esq., Attorney for Defendants; by JOSEPH F. MURRAY, Esq., of Counsel.

(Opening statements of counsel have been greatly abbreviated, and only short excerpts are printed for this record.)

Mr. Schenck: It is our view of the matter that Judge Bondy's opinion on those motions to strike out defenses constitute the law of the case.

The Court: Yes, that must be so.

193 The Court: When did you take over the possession of the building or control?

Mr. Schenck: There was a letter in respect of an agreement entered into with Central Park Properties in about the middle of January, 1931, giving us possession and control. So far as our legal possession and control, it did not come until through the foreclosure proceedings, but we got it about the middle of January.

Mr. Schenck: So that the rights of each party may be entirely protected, Mr. Murray and I have formulated a written stipulation in regard to the waiver of the ordinary jury and a trial before a 194 jury of one, and we have each signed this stipulation, with the names of the attorneys of record, and I think it would be a proper practice to have that filed and incorporated in the record.

The Court: It will be filed with the papers in the case.

The stipulation reads as follows:

IT IS HEREBY STIPULATED AND AGREED between the parties to this cause that the same shall be tried before a jury of one; and it is further stipulated and agreed that both parties shall be deemed at the conclusion of the trial to have moved for a 195 directed verdict, without reservation of any right to have any issue or issues submitted to the jury; and that neither party shall make any motion for the submission to the jury of any issue or issues.

Dated, New York, N. Y., May 7, 1934.

(Signed) ALFRED T. DAVISON,
Attorney for Plaintiff.

(Signed) THOMAS E. WHITE,
Attorney for Defendants.

196 PLAINTIFF'S CASE.

(Colloquy at beginning of case and opening statements are omitted.)

GORDON S. BRAISLIN, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. Schenck.

Q. Mr. Braislin, what is your present business? A. Vice-president of the Prudence Company.

Q. And during the period in controversy here what was your relationship to The Prudence Com-
197 pany? A. The same. Vice-president.

Q. That is, in September, 1929, and from that time to date, you were and are a vice-president of The Prudence Company? A. Yes.

Q. I show you what purports to be the original building loan agreement dated the 24th of September, 1929, and ask you what that document is (handing witness)? A. This is the building loan agreement between Central Park Properties, Inc., providing for this $6,650,000 loan on the building to be erected, now known as Essex House.

Mr. Schenck: I offer it in evidence.

198 (Marked Plaintiff's Exhibit No. 1.)

Q. I show you what purports to be the joint surety bond of the two defendants in this action, dated the 25th of September, 1929, and ask you if you recognize that as the original bond (handing witness)? A. Yes, this is the original bond.

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 2.)

Q. Mr. Braislin, as vice-president of The Prudence Company was it one of your obligations to superintend the advances that were made under the building loan agreement that has just been offered in evidence? A. Yes, it was. 199

Q. And at the beginning of the period or about the time or at the time of the execution of the building loan agreement was a certain substantial advance made to Central Park Properties, the borrower? A. Yes.

Q. Was this advance made in the form of a number of checks to the order of persons approved or directed to be made by the Central Park Properties? A. Yes. 200

Q. I show you eight cancelled checks and ask if the first installment loan was made by virtue of those eight checks? A. Yes, it was.

Mr. Schenck: I offer them in exhibit as one exhibit, if that is satisfactory.

(Marked Plaintiff's Exhibit No. 3.)

Q. What does these amounts total? A. I believe it is $3,250,000.

Q. I show you a large folder in a yellow cover and ask you if that is the specifications on this job, which were approved by the Prudence Company on or about the time of the execution of the building loan agreement (handing witness)? A. Yes, these are the specifications. 201

Mr. Schenck: I offer them in evidence.

(Marked Plaintiff's Exhibit No. 4.)

Q. Now, I show you, Mr. Braislin, a roll of blue print plans stamped "Plans Approved Prudence Co., Inc., date 6/14/29", and ask you if those are

202 the plans which were approved by the Prudence Company on or about the date of the making of this building loan agreement? A. Yes, these are the plans.

Mr. Schenck: I offer them in evidence.

(Marked Plaintiff's Exhibit No. 5.)

Q. Mr. Braislin, as I recollect it, in the building loan agreement, there is a reference to a certain amendment to specifications required by the Prudence Company; I ask you if this document being two sheets, dated the 24th of September, 1929, constitute those amendments? A. Yes, these are the
203 amendments.

The Court: Those are amendments to the specifications?

Mr. Schenck: Amendments to the specifications. I offer them in evidence.

(Marked Plaintiff's Exhibit No. 6.)

Q. I show you a copy of a letter from Prudence Company to Central Park Properties, dated the 13th of September, 1929, and I ask you if the original of that was sent on or about that date to the Central Park Properties? A. Yes.

204

Mr. Schenck: I offer them in evidence.

(Marked Plaintiff's Exhibit No. 7.)

(Remarks of counsel are omitted.)

Q. I show you, Mr. Braislin, what purports to be a letter from Mr. Lefcourt to the Prudence Company, dated the 13th of September, 1929, and attached financial statement and ask you if that was received by your company (handing witness)? A. Yes, sir, it is.

Mr. Schenck: I offer the two documents in evidence. 205

(Marked Plaintiff's Exhibit No. 8.)

Q. I show you a copy of a letter dated the 14th of September, 1929, to Central Park Properties, attention Abraham E. Lefcourt, president, and ask you if the original was sent on or about that date (handing witness)? A. Yes, it was.

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 9.)

Q. Reference has been made, Mr. Braislin, to a personal guarantee executed by Mr. Lefcourt. I 206
show you this document dated the 25th of September, 1929, and ask if that is such personal guarantee (handing witness)? A. Yes, this is a copy. But that is the guarantee, yes.

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 10.)

Q. I show you a letter Central Park Properties, Inc., by L. Haas, secretary, to The Prudence Company, dated the 2nd of January, 1930, and ask if that letter was received (handing witness)? A. Yes, this was received. 207

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 11.)

Q. I show you a copy of a letter from Prudence Company to Central Park Properties, dated the 6th of January, and ask if the original was sent (handing witness)? A. Yes, this was sent January 6, 1930.

208 Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 12.)

Q. Mr. Braislin, in regard to this Plaintiff's Exhibit No. 12, this copy of a letter of the 6th of January, The Prudence Company is speaking of the approval of certain samples of face and court brick, and it states that those samples "has this day been approved by the committee." Were you a member of that committee? A. Yes.

Q. What was the purpose of that committee? A. That was a committee which passed on plans and specifications and passed on applications for
209 changes in them, for loans which The Prudence Company was making.

Q. I show you a copy of a letter of the 7th of January, the Prudence Company to Central Park Properties, and ask if the original was sent on or about that day (handing witness)? A. Yes, that was sent.

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 13.)

Q. I show you a copy of a letter dated the 25th of January, 1930, from Prudence Company to
210 Central Park Properties, and ask if the original was sent on or about that day (handing witness)? A. Yes, this was sent.

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 14.)

Q. I show you a two-page letter from Central Park Properties to Prudence Company, dated the 23rd of January, 1930, and ask if that was received (handing witness)? A. Yes, this was received.

Mr. Schenck: I offer it in evidence. 211

(Marked Plaintiff's Exhibit No. 15.)

Q. I show you a letter from Central Park Properties to Prudence Company, the 24th of January, 1930, and ask if that was received (handing witness)? A. Yes, this was received.

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 16.)

Q. I show you a letter Central Park Properties to Prudence Company, the 24th of January, 1930, and ask if that was received (handing witness)? A. Yes. 212

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 17.)

Q. I show you a copy of a letter from Prudence Company to Central Park Properties, the 28th of January, 1930, and ask if the original was sent on or about that day (handing witness)? A. Yes.

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 18.)

Q. I show you copy of a letter from Prudence Company to Central Park Properties, the 31st of 213
January, 1930, and ask you if the original of that was sent on or about that date (handing witness)? A. Yes, this was sent by us.

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 19.)

Q. I show you a copy of a letter of the Prudence Company to Central Park Properties, the 4th of February, and ask you if the original of that was sent (handing witness)? A. Yes, we sent it.

214 Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 20.)

Q. I show you a letter of Central Park Properties to Prudence Company, the 3rd of February, 1930, and ask if that original letter was received (handing witness)? A. Yes.

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 21.)

Q. I show you a letter from A. E. Lefcourt to Prudence Company, dated February 5, 1930, and ask you if you have received that? A. Yes.

215 Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 22.)

Q. I show you a copy of a letter from Prudence Company to Central Park Properties, dated the 15th of March, and ask you if the original of that letter was sent? A. Yes.

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 23.)

Q. I show you a copy of a letter from the Prudence Company to Central Park Properties, dated
216 the 24th of March, and ask you if you received that letter? A. Yes, this was received.

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 24.)

Q. I show you a letter Central Park Properties to Prudence Company, dated the 7th of April, and ask you if you received that letter? A. Yes.

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 25.)

Q. I show you copy of a letter from Prudence Company to Central Park Properties, dated April 8, 1930, and ask you if the original of that was sent? A. Yes. 217

Mr. Schenck I offer it in evidence.

(Marked Plaintiff's Exhibit No. 26.)

Q. I show you copy of a letter from Prudence Company to Central Park Properties of the 10th of April, 1930, and ask you if the original of that was sent? A. Yes.

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 27.) 218

Q. I show you copy of a letter from Prudence Company to Central Park Properties, dated the 10th of April, 1930, and ask if the original of that was sent? A. Yes.

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 28.)

Q. I show you copy of a letter from Prudence Company to Central Park Properties, dated the 10th of April, 1930, and ask if the original of that letter was sent? A. Yes.

219

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 29.)

Q. I show you copy of a letter from Prudence Company to Central Park Properties, dated the 15th of April, and ask you if the original of that was sent? A. Yes.

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 30.)

220 Q. I show you copy of a letter dated 15th of April, 1930, Prudence Company to Central Park Properties, and ask you if the original of that was sent? A. Yes.

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 31.)

Q. I show you copy of a letter from Prudence Company to Central Park Properties, dated 21st of April, 1930, and ask if the original of that letter was sent?

Mr. Schenck: I offer it in evidence.

221 (Marked Plaintiff's Exhibit No. 32.)

Q. Now, Mr. Braislin, I show you a large piece of white paper, bearing date the 14th of March, 1930, and ask you what it is? A. This is a requisition submitted by Central Park Properties, Inc., asking for an advance on this building loan.

Q. There are certain ink figures upon this document and certain names written in ink; can you state whether those figures and those names were on the document when it came to you? A. Yes, all the ink figures on this requisition sheet were on the sheet when we got it; these pencil calculations
222 are our own.

Q. And those pencil calculations are based, so far as you know, upon the figures in ink upon the requisition sheet? A. Yes.

Q. Reference was made in what seems to be an earlier exhibit in this case, to your sending to Central Park Properties forms of requisition. As matter of fact is that document a printed form of the Prudence Company? A. Yes, this is one of our regular forms.

Q. And that is one of the documents sent in blank at the beginning of the loan by Prudence Company to Central Park Properties? A. That is correct. 223

Mr. Schenck: I offer that particular requisition sheet dated the 4th of March, 1930, in evidence.

By the Court.

Q. Is this the first of the requisitions received? A. Yes, I believe so.

Mr. Schenck: Yes, that is the earliest in date, I think, your Honor, and I presume it is the first received. 224

Q. Was that accompanied by an architect's certificate too? A. No, I think not. I think those were all we got.

The Court: Because I noticed, Mr. Schenck, the form calls for it.

Mr. Schenck: Yes.

(Marked Plaintiff's Exhibit No. 33.)

By Mr. Schenck.

Q. I notice, Mr. Braislin, that this form that has just been marked in evidence as Plaintiff's Exhibit 33, has a blank space for the certificate under the words "Certificate of Architect", and also has a form of affidavit, but that in neither case is the certificate made out or is the affidavit executed; can you tell me whether in all of the cases, all of the requisitions in this case, in accordance with your best recollection is true, that the Central Park Properties never furnished a certificate by an architect nor an affidavit in substantiation of 225

226 the requisition? A. That is my recollection. That was not done in any case.

Q. I also call your attention to the fact that this requisition is not signed by anybody, and I shall offer the other requisitions in a moment, but is that also your recollection with regard to other requisitions? A. Yes.

Q. None of the early requisitions, at any rate? A. Yes. I am not sure about these last ones.

Q. I shall make it a little bit more precise. None of the requisitions up to the time of the issuance of the certificate of occupancy were signed or executed or had an architect's certificate or any af-
227 fidavit in their support? A. That is my recollection.

By the Court.

Q. When you received these requisitions and noted that there was no accompanying architect's certificate or affidavit, did the Prudence Company call attention to that omission, or did you just waive it? A. I don't think we called any special attention to it.

By Mr. Schenck.

Q. At any rate, you never at any time by letter
228 or in accordance with your recollection, by oral demand, insisted that subsequent requisitions be certified by an architect and be supported by an affidavit? A. Not as I recollect.

Q. Now, I wish you would tell us the general practice of the Prudence Company with regard to what it did on the receipt of such requisitions from Central Park Properties in respect of any inspection or investigation on its part of the state of the building? A. These requisitions, when a

borrower wanted a payment, would send to me such a requisition made out, and I would get from our inspectors their latest reports. We had inspectors who probably, once a week, went to a building of this kind and made a report, giving the general progress of the work, generally trade by trade, and I would take the requisition and the report of our inspector the one against the other. 229

Q. Would your inspector be given this requisition, or would his view of the building be without this requisition? A. No, his would be an independent report.

Q. Now, speaking very generally, was it the practice of your inspectors in going to observe these different buildings to carry with them the specifications? A. No, it was physically impossible. 230

Q. I show you two checks of Prudence Company to the order of Central Park Properties, each appearing to be dated the 7th of March, 1930, one in the amount of $86,691.67, the second in the amount of $288,308.33, and ask if those constitute the instalment advance upon the requisition Plaintiff's Exhibit 33 (handing witness)? A. Yes, they do.

Mr. Schenck: I offer them in evidence. 231

(Marked Plaintiff's Exhibit No. 34.)

Q. Mr. Braislin, I show you ten requisition sheets, the first one being dated the 31st of March, 1930, and the last the 22nd of September, 1930, and ask you, if you will count them, if those are the ten additional requisition sheets between the first requisition sheet which has been offered in evidence and the last requisition sheet immediately preceding the issuance of the certificate of occupancy (handing witness)? A. Yes, they are.

232 Mr. Schenck: I offer them in evidence.

(Marked Plaintiff's Exhibit No. 35.)

Q. Among those documents which have just been offered in evidence and marked Plaintiff's Exhibit 35 there is a document which appears to be of a different dimension, and with typewritten rather than printed designations at the left. It is dated the 8th of September, 1930. Do you have any recollection as to the reason of the change of form, or any particular recollection in regard to that instrument (handing witness)? A. Yes, I believe they ran out of the other forms and sent
233 these in in this way, until we got the others.

Q. And as far as you know it has no other significance than that? A. No.

Q. I show you a bunch of checks, the first one dated the 4th of April, 1930. I think I shall itemize those by dates and amounts as I offer them. I show you the following checks of Prudence Company to Central Park Properties:

4 April, in the amount of $16,941.67; 4 April, $508,058.33; 2 May, $19,391.67; 2 May, $280,608.33; 23 May, 1930, $15,600; 23 May, $194,400; 20 June, $21,771.67; 20 June, $380,228.33; 11 July, $17,490; 11 July, $282,510; 1 August, $18,540; 1 August,
234 $191,460; 15 August, $12,858.33; 15 August, $77,141.67; 29 August, $13,068.33; 29 August, $61,931.67; 12 September, $13,243.33; 12 September, $31,756.67; 26 September, $13,348.33; 26 September, $106,651.67. I ask you if those checks which I have read were in payment of the requisitions which have just been offered in evidence (handing witness)? A. Yes, they are.

Mr. Schenck: I offer them in evidence.

(The 20 checks were marked Plaintiff's Exhibit No. 36.)

Q. The last requisition which I have shown you, Mr. Braislin, is dated the 22nd of September, 1930 (handing witness), and the last check that was offered in evidence is the 26th of September, 1930. Can you tell whether or not that last check was in payment of that last requisition? A. Yes, it was. 235

Q. I show you document dated the 6th of October, 1930, and ask you what that is (handing witness)? A. This is what we received on that date, one of our regular requisition forms, but instead of having any of the names of the contractors filled in or any figures simply this statement on it, and I might as well read it: "On October 3, 1930, the Bureau of Buildings of the Borough of Manhattan, City of New York, issued to Central Park Properties, Inc., the usual certificate of completion No. 16873, which is being delivered to you herewith, and we respectfully apply for the final payment due us amounting to $820,000 in accordance with agreement with you. Very truly yours, Central Park Properties, Inc., by Louis Haas, Treasurer." 236

Q. And the "Louis Haas, Treasurer" is signed by Mr. Haas, is it? A. Yes.

Q. On that particular document there are certain lead pencil figures over at the right-hand side. Can you say whether those were on it when received, or were they figures placed upon it after it was received? A. They were not on it when it was received. They are figures that our own people put on it. 237

Mr. Schenck: I offer this document in evidence.

(Marked Plaintiff's Exhibit No. 37.)

238 Q. I show you three additional documents, one dated the 13th of October, 1930, another dated the 20th of October, 1930, and a third dated the 3rd of November, 1930, and ask you what those documents are (handing witness)? A. These are similar documents. They are made out similar to our forms of requisition, and instead of having anything filled in in the way of names of contractors or figures, each has this similar statement requesting the final payment on this loan.

Q. And each recites the issuance of the certificate of what it calls completion, as the basis of the request? A. Yes.

239 Mr. Schenck: I offer them in evidence.

The Witness: It is a little different in wording. I can read this, too, if you like.

Q. I do not think that is necessary. A. All right. They each recite the certificate of occupancy has been issued and therefore the final payment is due.

(Marked Plaintiff's Exhibit No. 38.)

Q. At or about the time that these requisitions were sent to you, was there also sent to you as recited in the first requisition a copy of the certifi-
240 cate of occupancy? A. Yes.

Q. I show you this, which is not the identical document, but ask you if that is a copy of the certificate of occupancy (handing witness)? A. Yes, it is.

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 39.)

Q. I show you a letter dated the 1st of November, 1930, Central Park Properties, by Melvin

Brown, it looks like, vice-president and Controller, to Prudence Company, and ask you if you received that letter (handing witness), and whether it enclosed one or more of these requisitions that you have just referred to? A. Yes, it did. 241

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 40.)

Q. Mr. Braislin, do you recollect after you had received these requisitions calling for a final payment, or rather final advance of loan, because of the fact that a certificate of occupancy had been obtained, consulting with Mr. Mark, the attorney for Prudence Company as to what action you should take? A. Yes, I do. 242

Q. And do you recollect being advised by him as to what action you should take? A. Yes.

Q. I show you letter of Fidelity & Deposit Company of Maryland by Allen Major Race, Manager Contract Department, addressed to the Prudence Company, attention of Mr. Braislin, and ask you if you received that letter on or about its date? A. I did.

Mr. Murray: What is the date?

Mr. Schenck: 17th of November. I offer it in evidence. 243

(Marked Plaintiff's Exhibit No. 41.)

Q. I show you a letter from American Bonding Company, Allen Major Race, Manager Contract Department, dated the 21st of November, addressed to you as Vice-President of the Prudence Company, and ask you if you received that letter on or about its date? A. I did.

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 42.)

244 Q. I show you copy of a letter dated the 24th of November, 1930, from Prudence Co., Vice-President and General Counsel (the copy reads), to American Bonding Company, and ask if the original letter was sent on or about that date? A. Yes, it was.

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 43.)

Q. Could you tell us, Mr. Braislin, who the Vice-President and General Manager of the company was? A. Yes, Mr. Henry Mark.

245 Q. Can you state whether or not his initial is at the bottom, the left-hand corner of the letter? A. Yes. I also saw the original of the letter after it was signed by him, because I sent that out.

Q. It was signed by Mr. Mark, the counsel of the company? A. Yes.

Q. And Mr. Mark has since died? A. Yes.

Q. Now, I call your attention to the fact, Mr. Braislin, that this letter of Mr. Race of the American Bonding Company, dated the 21st of November, which is Plaintiff's Exhibit 42, refers to "Our telephone conversation with you of the other day", and it goes on to say that he will be pleased to re-

246 ceive the certificate of occupancy; do you recollect what that telephone conversation was? A. Yes, I do.

Q. If you will, give it to us. A. I called Mr. Race, in answer to that letter, which was the exhibit before that one, and with one of our inspector's reports in front of me, I told him exactly what our reports had shown.

Q. Did you also tell him that the Central Park Properties had obtained the certificate of occupancy? A. Yes, that is how he knew about it.

Q. Now, I also call your attention to the fact that this letter of Mr. Race of the 17th of November, addressed to you, which is Plaintiff's Exhibit 41, states "The writer recalls that on June 11th, you informed us that the contract was at that time over 50 per cent. completed and progressing to your entire satisfaction"; do you recollect having some such conversation with him on or about the 11th of June? A. Well, I cannot remember that exact conversation, but whenever Mr. Race called, I always gave him whatever information I had as to what our reports showed. 247

Q. Do you recollect that he at any time telephoned you between the 11th of June, 1930, and this telephone conversation in the middle of November, 1930? A. No, I do not. 248

Q. I show you checks of Prudence Company to Central Park Properties of the following dates and in the following amounts:

10th October, 1930	$13,628.33
10th October, 1930	136,371.67
17th October, 1930	7,001.67
17th October, 1930	92,998.33
14th November, 1930	37,125.00
14th November, 1930	28,398.33
14th November, 1930	204,476.67
5th December, 1930	33,333.33
5th December, 1930	75,000.00
5th December, 1930	191,666.67

249

I ask you if those checks constitute the final advances of the loan? A. Yes, they do.

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 44.)

Q. Mr. Braislin, during this period of time, that is, from the middle of October to and including

250 the 5th of December, did you have discussions with various people representing Central Park Properties as to the amount of advances you would make them? A. Yes.

Q. And during that same period of time, did you have a check made upon the general condition of the job by your inspector? A. Yes.

Q. And were reports made to you by this inspector of the general state of the job? A. Yes.

Q. And that inspector's name was what? A. Billsborrow.

Q. I show you three pages of a document purporting to be signed by R. E. Billsborrow, ad-
251 dressed to you, dated the 10th of November, 1930, and ask you if that is such a report?

Mr. Schenck: I ask that it be marked for identification.

The Witness: This is such a report, yes.

(Marked Plaintiff's Exhibit 45 for Identification.)

Q. I show you a similar document purporting to be made by Mr. Billsborrow to you, dated the 28th of November, 1930, and ask you if that is another such report? A. Yes, it is.

252 Mr. Schenck: I ask that it be marked for identification.

(Marked Plaintiff's Exhibit 46 for Identification.)

Q. I show you a list or estimate from Mr. Billsborrow, dated the 28th of November, 1930, and ask you if that is also such a report? A. Yes, it is.

Mr. Schenck: I ask that it be marked for identification.

(Marked Plaintiff's Exhibit 47 for Identification.) 253

Q. I show you what purports to be a similar report from Billsborrow to you, dated the 16th of December, and ask if that is also such a report? A. Yes, it is.

Mr. Schenck: I ask that it be marked for identification.

(Marked Plaintiff's Exhibit 48 for Identification.)

Q. And another list, dated the 16th of December, 1930, and ask you if that is also a report by Billsborrow of the same character? A. Yes. 254

Mr. Schenck: I ask that it be marked for identification.

(Marked Plaintiff's Exhibit 49 for Identification.)

Q. I show you a blue sheet, up at the top of which is printed "Inspection Report", and with five separate columns and ask you if that is or purports to be a summary of these different reports which have been marked for identification? A. Yes, it is.

255

Mr. Schenck: I ask that that be marked for identification.

(Marked Plaintiff's Exhibit 50 for Identification.)

Q. I show you copy of a letter dated 17th of December, 1930, from Prudence Company to Central Park Properties and ask if the original of that was sent on that date? A. Yes, it was.

256 Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 51.)

Q. At the time of your making the final advance of the 5th of December, did you receive from Central Park Properties this certificate which I show you? A. Yes.

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 52.)

Q. I show you what purports to be a report of the New York Appraisal Department by Peter A. Weller, addressed to you and dated 29th of De-
257 cember, 1930, and ask you if you received that report? A. I did receive it, yes.

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 53.)

Q. The New York Appraisal Department, that is a department of the Prudence Company, is it not? A. Yes.

Q. I show you another report of the New York Appraisal Department, by Peter A. Weller, addressed to you and dated the 5th of January, 1931, and ask you if you received such report (handing
258 witness)? A. Yes, I did.

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 54.)

Q. I show you a copy of a letter purporting to be written by you to Charles C. Peters. This copy of letter is dated the 6th of January, 1931. Mr. Peters was the attorney for Central Park Properties, was he not? A. Yes.

Q. I ask you if the original of that letter was sent on or about that day (handing witness)? A. It was. 259

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 55.)

Q. Have you seen recently a copy of this agreement in regard to possession, or have you a copy of it in your possession? A. I have not seen one recently. I will see if we can locate it.

Q. I show you a letter Fidelity & Deposit Company of Maryland, by Allan Major Race, Manager Contract Department, addressed to The Prudence Company attention of Mr. Braislin, the 7th of January, 1931, and ask you if you received that letter (handing witness)? A. Yes, I did. 260

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 56.)

Q. I show you a copy of a letter purporting to have been written by you to Fidelity & Deposit Company of Maryland, and also to American Bonding Company of Baltimore, dated the 13th of January, 1930, and ask you if you sent the original by registered mail on or about the 13th of January, 1931 (handing witness)? A. Yes, I did. 261

Q. So that the recital of "1930" in that letter is a typographical error? A. Yes.

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 57.)

Q. I show you a letter of Fidelity & Deposit Company of Maryland addressed to The Prudence Company, the 16th of January, and ask if you re-

262 ceived that letter (handing witness)? A. Yes, I did.

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 58.)

Q. I show you a letter American Bonding Company of Baltimore, addressed to Prudence Company, of the same date, and I think in the same form, and ask you if you received that letter on or about the 16th of January (handing witness)? A. Yes.

Mr. Schenck: I offer it in evidence.

263 (Marked Plaintiff's Exhibit No. 59.)

Q. I show you a letter of the 14th of February, 1931, addressed to Fidelity & Deposit Company of Maryland, addressed to American Bonding Company of Baltimore, and addressed to Central Park Properties, and I ask if you sent on that date three such letters by registered mail, one to each of the parties addressed (handing witness)? A. Yes, I did.

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 60.)

264 Q. I show you a letter from American Bonding Company by Allan Major Race, addressed to you, dated the 16th of February, and ask if you received that letter (handing witness)? A. Yes, I did.

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 61.)

Q. I show you copy of a letter written by you, addressed to Fidelity & Deposit Company of

Maryland, addressed to American Bonding Company of Baltimore, and addressed to the Central Park Properties, dated the 25th of February, and ask if on that date you sent separate letters to each of those three parties by registered mail (handing witness)? A. Yes, I did. 265

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 62.)

Q. Mr. Braislin, the letter just marked in evidence, Plaintiff's Exhibit 62, sets forth a list and certain details in regard to work and the condition of the job on Essex House. Before writing that letter, had you received from this same Mr. Billsborrow certain reports on that same subject? A. I had. 266

Q. I show you what purports to be a report of Billsborrow to you, dated the 14th of February, 1931, and ask if that is such a report (handing witness)?

Mr. Murray: Before the question is answered may I ask Mr. Schenck whether or not Mr. Billsborrow is going to be produced here at the trial?

Mr. Schenck: Mr. Billsborrow will, if our opponents want him, certainly be produced at the trial; but I am not offering these reports in evidence because of their inaccuracy, I am marking them for identification. I am not vouching for their accuracy at all. I shall show they are entirely inaccurate, but I have no hesitancy in producing Mr. Billsborrow. 267

The Court: The point is these reports are going to be marked for identification and not in evidence?

268 Mr. Schenck: Yes.

A. This is such report, yes.

Mr. Schenck: I offer it for identification.

(Marked Plaintiff's Exhibit No. 63 for Identification.)

Q. I show you a similar report from Mr. Billsborrow to you, dated the 20th of February, and ask if that is likewise a similar report (handing witness)? A. Yes, it is.

Mr. Schenck: I ask that that be marked for identification.

269

(Marked Plaintiff's Exhibit No. 64 for Identification.)

Q. I also show you what purports to be a third such report, dated the 24th of February, 1931, this particular report addressed to Mr. Goodnough. Mr. Goodnough is in the Legal Department of The Prudence Company, is he? A. Yes.

Q. And is it your recollection that a similar report of the same date was made to you? A. Yes.

Q. The 24th of February (handing witness paper)? A. Yes, I had a copy.

270

Mr. Schenck: I ask that that be marked for identification.

(Marked Plaintiff's Exhibit No. 65 for Identification.)

Q. I show you a copy of a letter dated the 31st of March, 1931, purporting to have been signed by you as vice-president, addressed to Fidelity & Deposit Company of Maryland and also addressed to American Bonding Company of Baltimore, and ask if on that date you sent and delivered to those

two parties two such letters (handing witness)? A. Yes. 271

Q. One to each? A. Yes.

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 66.)

Q. Now this is a letter from you, addressed to Fidelity & Deposit Company of Maryland, American Bonding Company of Baltimore and Central Park Properties, dated the 11th of April, 1931. Did you on that date send such a letter by registered mail to each of those three parties (handing witness)? A. I did. 272

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 67.)

Q. I show you a letter dated the 10th of June, from Fidelity & Deposit Company, Albert E. Hart, attorney, addressed to Prudence Company, and ask if you received that letter on or about its date (handing witness)? A. We did.

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 68.)

Q. I ask if you received this letter in the same form, dated the 10th of June, from American Bonding Company, by Albert E. Hart, attorney (handing witness)? A. Yes. 273

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 69.)

Q. I show you a copy of a letter from you, signed by you on behalf of The Prudence Company, addressed to Fidelity & Deposit Company

274 of Maryland, American Bonding Company of Baltimore and Central Park Properties, dated the 24th of June, and ask you if on that date you sent by registered mail one such letter to each of those three parties (handing witness)? A. I did.

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 70.)

Q. Mr. Braislin, I show you copy of a letter purporting to have been sent by you as vice-president, addressed to the Fidelity & Deposit Company of
275 Maryland, also addressed to the American Bonding Company of Baltimore, and also addressed to the Central Park Properties on the 9th of June, 1931, to which is attached a list consisting of six separate sheets of paper, and ask you if you wrote such a letter and sent it to each of those parties on that date and if, with the letter were copies of these lists of some six pages? A. Yes, I sent a letter to each of those parties with one of these schedules in each letter.

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 71.)

276 Q. I show you a letter purporting to have been written by you to the Fidelity & Deposit Company of Maryland, the American Bonding Company of Baltimore and Central Park Properties, dated the 6th of July, to which is attached two sheets of paper dated the 30th of June, 1931, and ask you if on that date you sent such a letter to each of the three parties, and each letter enclosed copies of the list? A. Yes, I did.

Mr. Schenck: I offer that in evidence.

(Marked Plaintiff's Exhibit No. 72.)

Q. I show you a letter from Fidelity & Deposit Company of Maryland, by Albert E. Hart, attorney, addressed to the Prudence Company, dated the 8th of July, and ask you if you received that letter? A. Yes. 277

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 73.)

Q. I show you a letter, apparently in the same form, from American Bonding Company, by Albert E. Hart, of the same date, 8th of July, 1931, and ask you if you received that letter? A. Yes.

Mr. Schenck: I offer it in evidence. 278

(Marked Plaintiff's Exhibit No. 74.)

Q. I show you a letter from the American Bonding Company, by Albert E. Hart, attorney, addressed to Prudence Company, dated the 3rd of September, 1931, and ask you if you received that letter? A. Yes.

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 75.)

Q. This is a certificate of Prudence Company, dated the 5th day of December, 1930, by Alexander Johnston? A. Yes. 279

By the Court.

Q. Who is Alexander Johnston? A. He was one of our law department—an attorney who handled most of the legal work in connection with these matters.

Mr. Schenck: I now offer it in evidence.

(Marked Plaintiff's Exhibit No. 76.)

280 *Further direct examination by Mr. Judd:*

Q. What time of the year was it when the Prudence Company obtained possession of this building? A. You mean whether it was in the winter time? Yes, it was.

Q. What arrangements were made for heating the building? A. Heat was supplied by the New York Steam Company, and we had to make arrangements with them to supply steam heat so that there would be no frozen pipes or other damage done.

Q. I show you eight checks; one dated January
281 10, 1931, in the sum of $3,615.78; February 21, 1931, $3,018.97; March 5, 1931, $4,107.72; April 6, 1931, $2,157.08; May 4, 1931, $381.31; June 19, 1931, $161.46; July 16, 1931, $102.50, and August 7, 1931, $102.60, all to the order of the New York Steam Corporation.

Mr. Murray: May I make a statement at this time, your Honor?

The Court: Yes.

Mr. Murray: I do not wish to be captious. I wish this case to be tried as simply as possible. I assume that these are checks in support of allegations of the payments claimed
282 to have been made, and I would like it understood for simplicity's sake, that I have no objection to their stating that they made this, that or the other payments, so long as it is understood that I am not admitting that the payments were proper or necessary or that they have any proper claim for them against the defendants.

The Court: Obviously whatever proof is introduced, you will not be precluded by such

proof; it is your privilege to meet it or overcome it. 283

Mr. Murray: The only thing I had in mind was that if I wanted to be technical, I should say that the propriety of the claims be first proven.

The Court: The witness has already stated that in order to avoid frozen pipes, that this steam was provided for. That might cover the period up to spring, but many of these checks, of course, run right into the warm weather and it would appear in that statement of necessity that there was no need for incurring the expense in those months. 284

Mr. Murray: I was not limiting myself to those particular checks, your Honor.

The Court: The general trend, I understand, all right.

Mr. Schenck: If I may say a word in that connection, we appreciate Mr. Murray's attitude in that respect, and we shall attempt to supply the necessity for the payment at the time the payment was made.

The Court: As I understand it, the necessity by this present list merely is that these expenses were made necessary in the winter months to avoid frozen pipes. 285

Mr. Schenck: Yes. There is one further that has not been called to your attention, which I may mention at the present time, and that is, the complaint is drawn under the principles set forth in section 255A of the Civil Practice Act, which allows, under certain circumstances for the plaintiff to attach schedules of damage and schedules of items of expenditure to the bill of complaint, and

286 then requires the defendant to make a specific denial in order to put those expenditures in issue. That is one of the points on the memorandum of law that I have submitted. We are not insisting upon that practice; we are going to introduce a prima facie case in regard to all these expenditures, and I think the trial may be somewhat shortened if we be allowed a little latitude in proving the items so that we get down as quickly as possible to whatever items may be in dispute.

The Court: That seems to be agreeable to Mr. Murray. Indeed, he does not in his present position indicate any denial that you made 287 the payments, but raises the question as to their necessity.

Mr. Schenck: Yes, Mr. Murray need not be in any way precluded by this.

Mr. Murray: I would like to have some understanding, if I may, on this question of 255A. If your Honor will remember, this section has a provision where in the case of goods sold and delivered or any materials furnished and a schedule is attached to the complaint, the defendant's general denial of the allegation in the complaint that the services were 288 rendered and the materials furnished, does not constitute an issue, but that in order to constitute an issue, it is necessary to plead as to each individual item in the schedule. Now, I have proceeded upon the assumption and still claim that that section does not apply to our case where materials were not furnished to us and where the services were not rendered to us, but naturally, if advantage were to be taken of that section at this time,

I should like to amend the answer to plead as to each one of those items. 289

The Court: I think you better do that, of course. In the section, I find that it covers not only the sale and delivery of the goods but also the rendering of labor, work and services.

Mr. Murray: Rendering, your Honor.

Mr. Schenck: That point that Mr. Murray raises has been determined against his contention.

Mr. Murray: Then I would like to amend the answers now, so as to specifically deny the propriety— 290

The Court: The necessity?

Mr. Murray: The necessity of these services and this work.

The Court: Without raising an issue as to the reasonable value thereof or the payment?

Mr. Murray: Yes. That also is an issue in certain respects, your Honor, in a certain few items.

The Court: Under the practice, you want to specify those items?

Mr. Schenck: I don't think Mr. Murray can deny each and every item of this claim, which mounts up to some $400,000. I think 291 it might be feasible for him overnight to go over this,—if he will go through our schedules in the meantime—

Mr. Murray: I will be glad to do that.

The Court: I think we better proceed that way and Mr. Murray will be prepared tomorrow to amend his answers in the particulars set forth

Mr. Murray: Yes, your Honor.

292 A. These are the checks in payment of these steam bills.

Q. I call your attention to the vouchers supporting the checks, dated July 16th and August 7th, particularly the line which reads "minimum bill". A. Yes, sir.

Q. I ask you if you can explain the necessity of steam payments for steam during the months of June and July? A. Yes, sir. If you do not pay the minimum bill you lose your connection, and if you lose your connection you have to get a new contract, and then you lose the benefit of the rest of the year at the lower rate.

293 Mr. Judd: I will mark in evidence now the eight checks.

(Marked Plaintiff's Exhibit No. 77.)

Q. Certain of those checks, Mr. Braislin, are checks of 58-59 Realty Corporation? A. Yes, sir.

Q. And others of The Prudence Company. Can you tell us what the 58-59 Realty Corporation was? A. That was a corporation formed to take title to this property.

Q. Who owned its stock? A. The entire stock is owned by Amalgamated Properties, Inc., whose stock in turn is owned by The Prudence Company.

294 Q. So that the 58-59 Realty Corporation was a subsidiary of The Prudence Company? A. Yes, sir.

Q. Was it necessary to have electric current in the building in connection with the construction and completion of the items which were referred to in the notices to the surety company? A. Yes, it was.

Q. I show you five checks to the United Electric Light & Power Company, dated January 30, 1931,

in the sum of $1,878.24; May 22, 1931, $31.64; June 19, 1931, $834.56; July 21, 1931, $1,202.32; August 19, 1931, $1,137.12. I ask you if you can identify those checks and the vouchers (handing witness)? A. Yes, sir; those are the checks for payment of the electric current. 295

Mr. Judd: I offer those checks in evidence.

(Marked Plaintiff's Exhibit No. 78.)

Q. I show you a receipted bill of Marks Bros., Inc., dated January 10, 1931, in the sum of $345.26. I ask you if you can explain that bill and what it is (handing witness)? A. Yes, this is for replacement of broken glass in the building. It still being wintertime, that was necessary to keep the cold out, also to prevent freezing. 296

Mr. Judd: I offer that in evidence.

(Marked Plaintiff's Exhibit No. 79.)

Q. I call your attention, Mr. Braislin, to the items in the complaint as to expenditure for electric current and for steam, items 18 and 34 of Schedule A (handing witness), which are somewhat different in period covered and total amount claimed from the vouchers which have been introduced. A. Yes. 297

Q. I ask you if you can tell us the difference between the checks and vouchers which have been introduced and the amounts claimed in the complaint? A. We are claiming in the complaint only those items which were directly a result of the state of the building itself and—

Q. I call your attention to the date of the items claimed in the complaint. A. Well, it is April 4th to October 2, 1931, and there are some items in these checks which are prior to that time.

298 Q. Did you prepare the schedules which are annexed to the complaint? A. No, I did not prepare them myself. Our company prepared them. The same is true of the steam bill. That begins March 1st, and there were payments of steam bills prior to that time.

Q. And those payments of steam bills were necessary in order to preserve the building and prevent freezing of pipes, as you have testified? A. No question about it.

The Court: Mr. Judd, am I to understand that checks constituting Exhibit No. 77 cover
299 the items of payment shown in the classification 34 of Schedule A, and that Exhibit No. 78, the five checks, includes payments listed in the item 18 of Schedule A?

Mr. Judd: Yes. The amounts do not correspond exactly, but it is our position that the variance is not a material one. It is caused by the fact that the vouchers had not been examined by the man who prepared these schedules and the payments which were made before Bing & Bing took possession of the building were not included in the schedules of electric current and steam.

300 The Court: Perhaps I ought to put my question a little differently. Is it your contention that Item No. 18 is proved by the Exhibit 78?

Mr. Judd: Well, we have introduced checks totalling $5,083.88.

The Witness: There are more checks than are shown.

Mr. Judd: We have not proved the months of August and September.

The Court: Then you will have to give additional proof in order to show payment of Item 18; is that right? 301

Mr. Judd: We intend to withdraw those claims.

Mr Schenck: We have withdrawn those because it was so close to the end of the completion operation that we thought those expenses were more properly attributable to the expense of running the building than to completion.

The Court: Are you withdrawing 18 and 34?

Mr. Judd: No, we are withdrawing the last two months charged in 18 and 34. 302

The Court: Then your proof will be a modification of 18 and 34?

Mr. Schenck: Yes.

Mr. Judd: Yes, your Honor. Your Honor will note the amounts spent for steam and electricity rise considerably in August and September, on both those items, when the building was being made ready for tenants, and we thought it was impossible to apportion the amount for those months.

Mr. Murray: Along the same line that was going through your Honor's mind, the steam consumption, the item of 34, is for $1,686, and I think the totals of these steam checks are considerably in excess of that. 303

Mr. Judd: The total is $13,647.42.

The Court: Thirteen thousand dollars?

Mr. Judd: $13,647.42.

The Court: You are not planning to get an allowance in excess of what you claim here in your complaint, are you?

304 Mr. Judd: We are, your Honor. The steam payments were required in the completion of the building, and we have alleged in general terms our damage through the failure of the Central Park Properties to complete. We did not have those vouchers and did not know of the payments at the time the complaint was drawn.

Q. Under what item of Schedule A did you get your thirteen thousand dollars, or does it appear there in Schedule A?

305 Mr. Judd: The thirteen thousand does not appear in Schedule A, but it is part of our general damages alleged in the complaint.

The Court: You cannot get it twice, can you?

Mr. Judd: No, we are not asking for it twice.

The Court: Then are you withdrawing 18 and 34?

Mr. Judd: We ask that Item 18 be amended to show the amount of our present claim as $13,647.42.

The Court: That is Item 18?

306 Mr. Judd: Items 18 and 34, the item of steam consumption.

The Court: What have you to say about that?

Mr. Murray: On the same question of not wanting to be technical, I presume if they move to amend I will have no objection to it.

The Court: Then the motion to amend Item 34 is granted.

Q. I show you a check, Mr. Braislin, to the order of Holmes Electric Protective Company, in

the sum of $502.11, dated April 7, 1931, and ask you if you can identify that check and tell me what its purpose was (handing witness)? A. I can. We employed this company to keep watchmen at this building prior to this period and subsequent to the time that we took it over. 307

Q. And that is the charge for their services as watchmen? A. It is the charge for their service, for keeping watchmen there.

Mr. Judd: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 80.)

Mr. Murray: As I read the complaint, your Honor, the damages which they claim are a total of the items listed in the two different schedules: Is that right, Mr. Judd? 308

Mr. Judd: There are schedules annexed to the complaint which shows our expenses in completion as we understood them at the time, but the complaint alleges in general terms the amount of our damages. This item of Holmes Electric Protective Company is not specifically set forth in the complaint.

Mr. Murray: As I read the complaint the total amount demanded is the total of those sums which are set forth in the schedules. 309

The Court: In the two schedules.

Mr. Murray: In the two schedules.

The Court: There are two causes of action: Is there a recovery sought under each cause, exclusive of the other?

Mr. Judd: No, the total recovery sought is not greater than the highest amount claimed, which is in the second cause of action, and this check to the Holmes Electric Protec-

310 tive Company does not increase the amount of our claim beyond the amount demanded in the damage clause.

Mr. Murray: I really cannot understand it yet, your Honor. The claim is that the plaintiff has expended for completion one hundred and sixty-six thousand and some odd dollars, which is the total of the items of Schedule A.

The Court: That is right: That is Item A.

Mr. Murray: Then the second claim is that there are omissions of labor and materials,
311 totalling two hundred and twenty-eight thousand and some odd dollars. That is Schedule B. Now apart from those two items, and interest which they allege as 3 and fees of supervision which is 4, and taxes which is 5, and taxes which is 6, and insurance which is 7, there is no general allegations of damages as I read the complaint.

Mr. Judd: There is an allegation in Paragraph XXXVII, that by reason of the defaults of Central Park Properties and the defendants the plaintiff has been damaged in
312 the sum of $788,676.94. This is part of the damages which we have suffered.

Mr. Schenck: If your Honor please, the complaint was drawn on the theory that we would attach, as we had given lists of these claimed items of incompletion as we ascertained them, and as we notified them as to when Bing & Bing were going to make their inspection, and ask that they go if they so desired and join in that inspection. So that

our complaint would be based upon the same theory and attach these detailed items of damage so that we would know just exactly what they would admit and what they would deny. Instead of doing that they put in a general denial of the items. They did not follow our suggestion of getting down to specific items. And so when we came to prepare the case for trial we considered ourselves at full liberty, inasmuch as the complaint contained a general allegation of damage, to make any corrections that further investigation showed might be appropriate, and also to add any items for this list of incompletion and list of damage that was prepared by Messrs. Bing & Bing, in regard to expenditures before that time, including steam and including watchmen's service. It seems to me if the defendants are going to attempt to restrict us to the exact form of these schedules—

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The Court: I think what he is doing thus far, which is the very thought that is going through my mind, is endeavoring to reconcile the schedules with the general claim of damage. For example, he wants to know, and so do I, where this item of Schedule B, $228,722.78 fits in with the items of Paragraphs 1 to 6 forming part of Paragraph XXXXI of the complaint. That is your position, is it not?

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Mr. Murray: That is exactly my position, your Honor.

The Court: In Paragraph XXXXI your claim that the plaintiff has been damaged in the sum of $950,706.68, and you follow that

316 with six items, the total of which I understand is that sum which I have just stated. Schedule A is covered in the first item of that Paragraph XXXXI. Where is the Schedule B, and where does it fall?

Mr. Schenck: We alleged that we made certain expenditures in completion, and the sum total of those expenditures in completion, and expenses in completion—I do not remember the exact figure, but we will say we state on our schedule and show on our schedule they are $166,000.

The Court: That is covered.

317 Mr. Schenck: Made up of specifically stated items.

The Court: Yes.

Mr. Schenck: In an attempt to avoid a general issue. Our opponents do not follow that practice, and do not join in admissions and denials of those expenditures.

The Court: This complaint, after all, was drawn before you knew what your opponent was going to do.

Mr. Schenck: Yes.

The Court: Let us not worry about their practice, but what I want to do is to check

318 up this Schedule B with some item 1 to 6 of the final paragraph of your complaint. Where does it fall?

Mr. Schenck: I am just saying about the sum total of these expenses we claim in view of the defendants' answer we are now at liberty to withdraw any item of expenditure, to add to any item of expenditure, and to give, for instance, if there is an item of expenditure before Messrs. Bing & Bing—

The Court: Let us say that that is so, without attempting to argue it. Let us assume you are correct in that respect. My question and Mr. Murray's question are not answered. Paragraph XXXXI, Items 1 to 6. The last paragraph before the "Wherefore" clause. 319

Mr. Schenck: I would say that this particular item, the second cause of action being on a different theory, is not within any of those allegations of the second cause of action.

The Court: Then let us get to the first cause of action.

Mr. Schenck: I want to be perfectly fair in the matter. My point is that where we allege in our first cause of action that we have made expenditures— 320

The Court: Just refer me to the paragraph number.

Mr. Judd: Paragraph XXXVII.

Mr. Schenck: Paragraph XXXVII: "That by reason of the defaults of Central Park Properties and the defendants hereinabove set forth, this plaintiff has been damaged in the sum of $788,676.94, with interest thereon as hereinafter set forth."

The Court: Yes, and then in the second subdivision of that paragraph you find the figure $228,722.78, which is the Schedule B annexed to the complaint. 321

Mr. Schenck: Which is Schedule B, but the matter I had in mind was the subdivision 1: "This plaintiff has expended for completing said building to the extent of making same ready for occupancy the sum of $166,054.29." Now we attach a schedule.

322 The Court: That is Schedule A. That is clear.

Mr. Schenck: Inasmuch as those items of expenditure have had issue joined upon them, we claim, whether an amendment of the complaint or not is necessary, that we may now, so long as we do not exceed that figure, withdraw any item or amend any item or add any item of actual expenditure. That is what we are doing now.

The Court: No.

Mr. Schenck: We are now attempting to get an expenditure for the Holmes Patrol,
323 an expenditure which is not itemized in this list at all; and the bond specifically allows us that expense. It is true we have not pleaded it, and it is true that if the defendants joined issue with us on our general form of complaint and specifically admitted this item or that item, all of the items that are admitted would be thrown out of the case, we would be litigating the items that they denied, and they might well say this item of three thousand dollars or whatever it is for watchman, we being so specific they are going to hold us to
324 our specification and say we cannot amend. But I do not think they are in that position now.

The Court: I do not think he has raised the point. He is not arguing that. He is trying to fit the crossword puzzle together, as I was, and it now appears that Schedule B forms part of your first cause of action.

Mr. Schenck: Yes.

The Court: And cannot be tied in so far as I can see with your second cause of action.

Mr. Schenck: That is correct. But the 325
particular schedule that we are now discussing, that is the expenditures, is Schedule A. Those are items of expenditure in completion, and among those we claim is this expense of watchmen properly included. Schedule B is estimates and valuations.

The Court: That is clear.

Mr. Murray: If there had been a specific allegation in the complaint of $166,000 plus of expenses, your Honor, we would be entitled to a bill of particulars having those items specified.

The Court: He gave you that. 326

Mr. Murray: Immediately on the institution of the action. We have relied upon this and I think there should be some limit to the additional items.

The Court: I think Mr. Schenck introduces a tenable law proposition when he says inasmuch as there has been no denial of the specific items set forth he may modify by subtraction or addition. I will say to both counsel that I am going to give considerable leeway in respect to amendments of the pleadings, since there is no jury here.

Mr. Murray: That is what I would like to 327
have you do, your Honor, because I firmly believe that 255-A has no application to the case of a surety to whom no material was delivered and for whom no services were performed, and that the intent of that Section was to hold you when I sold something to you or I did something for you under a contract, and you ought to know those things.

328 The Court: The view that I now take of it is that you are bound by that practice. However, if you want to show me authority by tomorrow morning I will be glad to look at the cases.

Mr. Murray: All right, your Honor.

Mr. Schenck: I think we might also say that there will be during our proof some modification of these schedules, all, however, within the sum total of the complaint, and we shall proceed in regard to it with as much clarity and as much fairness as we possibly can to our opponents, and we shall give our
329 opponent lists so that he may have full opportunity of cross examining in regard to it.

The Court: I think, for example, at the conclusion of the session this afternoon if there are any substantial additions to either Schedule A or B, you ought to let Mr. Murray have them, so he will know where he is at.

Mr. Schenck: We shall do so. There will be no additions to the sum totals. There will be some modifications of the items within those sum totals.

Q. Mr. Braislin, the building loan agreement in
330 one of its clauses required the borrower to maintain adequate fire insurance on the premises. Did The Prudence Company continue payment for fire insurance after Central Park Properties had defaulted? A. Yes, it did.

Q. I show you checks to the order of the Remsen Brokerage Company, as follows: $2,035.44, dated May 18, 1931; $1,120.83, dated July 24, 1931, and $1,029.17 dated September 10, 1931, together

with vouchers. I ask you if those are checks for 331
insurance on the building (handing witness)? A. Yes, they are. They are all fire insurance, except one which is for elevator liability and the other is for sprinkler leakage damage.

Q. Have you stated the date of completion of the building? Have you stated the date when the building was actually completed? A. No, I did not state that.

Q. Will you give us that date? A. The building was not actually completed until the following Fall. I think in October, 1931.

Q. Can you tell me how much of these checks (handing witness) for insurance is apportionable 332
to the period ending October 1, 1931? A. It is not here. It has doubtless been calculated.

Q. I think it is calculated on one of those sheets (indicating). A. Oh, yes. $1,640.87, is the pro rata share through October 1, 1931.

Mr. Judd: I offer those checks in evidence.

(Marked Plaintiff's Exhibit No. 81.)

Q. Can you tell me whether taxes were paid by The Prudence Company on this building during the period at issue? A. Yes, they were.

Q. I show you checks to the order of the City 333
Collector, dated May 28, 1931, and November 28, 1931, each in the sum of $38,080, and ask you to identify those (handing witness). A. Yes, those are the checks with which payments of taxes were made.

Q. Can you tell me what period those checks cover? A. Together these cover the calendar year 1931.

334 Q. So that the amount attributable to the period ending October 1, 1931— A. Is three-quarters of the total.

Mr. Judd: I offer those in evidence.

(Marked Plaintiff's Exhibit No. 82.)

Q. Can you give us the definite amount of that, Mr. Braislin for the first half, and for the three months of the second half before the building was completed? A. $57,120.

Q. That is the total for the nine months? A. Yes.

335 Q. Was there a telephone connection in the building prior to its completion? A. Yes.

Q. Was it there when The Prudence Company took it over? A. I am not sure offhand whether we had to have a new one installed; I know we had one shortly after we took it over.

Q. I show you a check in the sum of $15.60, and ask you if you can identify that? A. Yes, that is in payment of a telephone bill rendered February 1, 1931.

Mr. Judd: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 83).

336 Q. Mr. Braislin, can you tell me the amount which was due on the building loan agreement on December 16, 1930,—the amount due to The Prudence Company? A. $6,650,000.

Q. Was any payment received on account of the principal? A. The $75,000 deposited, which was deposited with us under the agreement, which is now in evidence, was at a later date applied on account of principal. Other than that, no payment on principal has ever been received.

Q. Was any interest received from Central Park Properties, Inc. prior to October, 1931? A. Except for those interest items which were deducted from payments during construction. 337

Q. Was any? A. After the last advance was made, no interest was received.

Q. So that The Prudence Company was deprived of interest on this sum of $6,650,000? A. Yes.

Q. From the time of the final advance to October 1, 1931? A. That is correct.

Q. Can you tell me what the amount of that interest was? A. I will try to calculate it for you, unless you have it already calculated. 338

Q. I call the witness's attention to item, subdivision 4, I believe it is paragraph 37 of the complaint? A. $325,462.50.

Mr. Judd: That is all.

Cross examination by Mr. Murray.

Q. What was your duty at The Prudence Company, Mr. Braislin, in and prior to September, 1929; what duties did you perform? A. Well, I had charge of the making of the building advances on all building loans. I don't know whether you are interested in my other duties,—I suppose that is all you want to know. 339

Q. What other duties did you have? A. I had charge of the mortgages in Brooklyn, Queens and Long Island at that time. Those were my two duties there.

Q. Did you pass upon the propriety of making loans— A. In those boroughs, not in New York.

Q. And not in New York? A. No.

340 Q. Did you have anything to do in connection with the making of this particular loan to Central Park Properties? A. Nothing at all.

Q. When did you first hear of the matter? A. When the letter of acceptance was signed and when it went around the company; that is the first notice I had.

Q. What is a letter of acceptance? A. That is an agreement which embodies in a brief form what later goes into the building loan agreement.

Q. I show you this instrument and ask you whether you recognize that (handing witness)? A. This is a letter of acceptance. It looks to me
341 like the copy of the one that was signed in this case.

Mr. Murray: I offer it in evidence.

(Marked Defendants' Exhibit A.)

Q. Will you tell me specifically, Mr. Braislin, whether you had any duties to perform whatsoever, in respect to this letter of acceptance, as you call it, or "loan acceptance" as it is marked here? A. Nothing other than to prepare for the making of the advances. The plans and specifications were sent to the inspection department, which I
342 also supervised, and inspectors were prepared to make their inspections.

Q. You had charge of the inspection department? A. Those men were under me.

Q. They were under you. You had general supervision over them? A. That is correct.

Q. Did you employ them? A. Did I hire them, do you mean?

Q. Yes. A. No.

Q. Did you have the right to discharge them? A. Yes.

Q. Who, under you, was in charge of the inspection department? A. Mr. Walters and later Mr. Billsborrow. Mr. Billsborrow took Mr. Walters' place during the course of this loan. 343

Q. And what was the time when Mr. Walters left The Prudence Company? A. I cannot give you the exact date.

Q. Can you approximate it? A. Yes, I think I can. It was during the summer of 1930—the late summer, I should say.

Q. And who appointed Mr. Billsborrow to Mr. Walters' vacant place? A. I did.

Q. How long had Mr. Billsborrow been with the company? A. About three years. 344

Q. How long had Mr. Walters been with the company? A. I think not as long as that; I think a year and a half or two years.

Q. Do you know what qualifications Mr. Walters had? A. He was an engineer, and I think he had been on several building jobs actually himself as building superintendent; he knew building construction.

Q. And do you know what Billsborrow's qualifications were? A. Very similar. He also had been a building superintendent and was an engineer.

Q. When this loan acceptance was executed, Mr. Braislin, did you familiarize yourself with the history of any negotiations leading up to the making of the loan? A. In a general way, yes. 345

Q. Do you know when Mr. Lefcourt first approached The Prudence Company on this loan? A. No, I do not.

Q. Who, in your organization would know? A. I should say Mr. Bigelow.

346 Q. What were Mr. Bigelow's duties? A. He was in charge of the negotiating of loans in Manhattan.

Q. Was it Mr. Bigelow who negotiated this loan? A. Yes, he followed it all the way through.

Q. So that the duties which you performed as regards Brooklyn and Long Island, Mr. Bigelow performed as regards Manhattan, is that correct? A. Yes, in general.

Q. And do I understand that in addition to those duties, you also had to do with the making of the advances even on loans made in Mr. Bigelow's territory? A. Yes. My position in Brook-
347 lyn and Queens was not quite the same as his, because I had charge of it and did a good deal of deciding in Brooklyn,—much more than he did in New York. I had a lot of people who did negotiating in Brooklyn.

Q. You did the deciding? A. I did part of it, yes.

Q. Did Mr. Bigelow do negotiating and deciding? A. Not as much. In each borough we had a loan committee which passed on loans, making loans, and Mr. Bigelow would report to that committee the result of his negotiations, on what basis he could close loans and get their approval or
348 disapproval.

Q. Were you limited in that manner in your territory? A. Yes, we had a committee, too.

Q. Was there any general bases upon which loans were made by The Prudence Company, as to the proportion of the value of the property? A. I don't think there were, no. There was basis on the amount of the loan that we made, but the making of any loan, is a matter of a man's judgment. We had our committee, and they passed on loans,

if the collateral was good security, otherwise they would not make the loan. 349

Q. And then do I understand properly, Mr. Braislin, that you had nothing whatsoever to do with the preparation or execution of this Defendants' Exhibit A? A. Nothing at all.

Q. Did you have anything to do with the approving of the specifications in this matter, Mr. Braislin? A. Yes, I did. I did not have anything to do with the passing of the specifications that were referred to in the loan, but I was on the committee that considered the modifications in those specifications.

Q. Do you know the specifications which were referred to in the loan acceptance agreement? A. Yes. 350

Q. And are they the same specifications which were identified this morning as the specifications upon which the loan was granted? A. Yes.

Q. You were familiar with the specifications? A. I was familiar with the applications that were made for modifications in them, because they came up before the committee, of which I was a member.

Q. Before this loan was granted, do you know whether these specifications and the plans which have been marked in evidence, were handed to your inspection department? A. I believe they were, yes. 351

Q. And after the loan was granted, did you familiarize yourself with the specifications? A. Do you mean did I sit down and read them? No.

Q. Did you acquire knowledge of the contents of the specifications? A. I acquired a knowledge of whatever there was a question to decide, because that came up before the committee. It was

352 the duty of the engineer in charge of the inspectors to see that the specifications were submitted to him. He looked at them, of course. He considered changes that were applied for, and brought those applications up before this committee, which considered them.

Q. Did you ever discuss, in connection with this particular matter, the specifications with your engineering department or inspection department? A. We had many meetings to decide these questions, which resulted in a good many of these letters that were put in evidence this morning.

353 Q. When any question arose, who had charge—the physical charge of the specifications? A. Mr. Walters and later Mr. Billsborrow.

Q. And from time to time, did you see these specifications produced before meetings? A. Oh, yes.

Q. What was Mr. Walters' duty in connection with this particular loan? A. He was in charge of this inspection department, and the reports which his inspectors made to him, he would go over with them and would calculate and submit to me his estimate of the percentage of the completion of that building.

354 Q. Do you know whether Mr. Walters, from time to time went to the building himself? A. Yes, he did.

Q. Was this the largest loan of this nature which the Prudence Company ever made? A. The largest one.

Q. I show you Plaintiff's Exhibit 3, Mr. Braislin, and ask you whether you have totalled the without totalling, what the total amount is? A. amounts of those checks or whether you know $3,250,000.

Q. Is Mr. Bigelow still with your company? 355
A. No.

Q. Do you know where these specifications were prepared and how long they had been in the possession of The Prudence Company? A. No, I can not tell you the time.

Q. Do you know whether an application for a loan was made by other people before Mr. Lefcourt, upon these specifications? A. I know there was another application made on this plot—made by a group called The Syndicate Subscription Corporation. Whether he was in that or not, I do not know, and whether those specifications came with that application, I don't know. 356

Q. Were you familiar with your requisition sheets, Mr. Braislin? A. Yes.

Q. I am showing you Plaintiff's Exhibit 33; do you know who prepared the requisition, to show the items of classes of work? A. Do you mean who in our company?

Q. Yes. A. No, I do not. That was a form that we had used for several years.

Q. Will you give me a little more in detail, the mechanics performed by you before you made the first advance under this requisition, Plaintiff's Exhibit 33? A. Is that the first advance made on this? 357

Q. I understand this was the first advance, March 4, 1930? A. I had the requisition of the Central Park Properties, giving their estimate of the amount of work done at that time. I also had a report of our inspector giving me trade by trade—

Q. Just a minute, what inspector, Mr. Braislin? A. The inspector under Mr. Walters, who in-

358 spected this job was a man named Schermerhorn. So that the report I got was a joint report of Mr. Walters and Mr. Schermerhorn. It contained their estimate of the percentage of completion of each trade, which had any substantial amount of work done; also Mr. Walters' estimate of the percentage of the whole job that was completed at that time. I knew the total of the work as estimated. I think it showed on that requisition. I knew our estimate of the cost of that building, and by taking the percentage of that total cost and comparing it with the value of the work, labor and material, as given in that requisition, I formed my
359 opinion as to what the value of the labor and material installed at that time was.

Q. What was your estimate as to the cost of the building? A. Without consulting the figures, I cannot tell you.

Q. Is there anything on that sheet to help you indicate what your estimate was?

The Court: Do you mean the final cost or the cost to date?

Mr. Murray: The total cost of completion.

A. I would rather not hazard a guess on these figures. There are several figures here.

360 Q. Are all these pencil marks yours that are on that exhibit? A. No, those are the pencil marks of a Miss Elton who made some preliminary figuring on this thing. None of my figures are on there.

Q. I call your specific attention to budget items numbers 19 and 20 on that sheet. The No. 19 item is what? A. It says "wooden window frames and sash".

Q. And No. 20 is what? A. Metal window frame and sash. 361

Q. Now, do you know what these specifications provided as to window frames and sash, whether they should be wood or metal? A. I know the fire department would not let them put them in wood, so I assume they specified metal. From my recollection of the specifications, I don't recollect, no.

Q. Did you give any specific directions to the inspector of the engineering department, Mr. Braislin, as to the inspection of this job? A. Do you mean to handle this in any way other than we would any other large building? 362

Q. No, did you give any specific directions as to this job? A. Not that I recall.

Q. Do you know why the affidavit which appears on the top of this Exhibit No. 33 was not executed? A. Just carelessness on the part of the person submitting, I should say.

Q. Did you usually make advances without that affidavit having been executed? A. Oh, I should say that in three-quarters of the loans, people did not fill it out.

Q. You depended upon your inspectors, I presume, to check on the figures which were submitted on the requesition by the borrower, is that right? A. No, I relied on both reports. If there ever was a serious difference in those things, it generally resulted in my talking to the inspector. Of course, I would talk to the borrower, too. 363

By the Court.

Q. But if your inspector's report confirmed the items of the requisition, then you raised no question? A. Exactly.

364 Q. If, however, there was some serious discrepancy, you did raise a question? A. Exactly, sir.

Q. In that case, you would look in the first instance to the furnishing of an affidavit or a certificate by the architect? A. That is so.

By Mr. Murray.

Q. Can you tell by looking at this Plaintiff's Exhibit 33, what percentage of the work installed, an advance was made upon? A. No, I don't think I can. I can calculate what per cent. they show here.

365 Q. But your inspector's report does not appear there, does it? A. This is not our inspector's report.

Q. No. Is there anything in that exhibit to indicate what your inspector's report showed? A. Not that I would want to identify here. I see two figures. I see 16 per cent. and 12½ per cent. Neither of them are my figures and I would rather not identify them. Our inspectors' reports are, of course, on separate sheets.

Q. Is it fair to say that you depended almost exclusively on your inspector's reports in making the advances? A. To my mind, as I think would
366 be the case in anyone's mind, a person probably relies on the report of his own man more than he would rely on somebody else's report, particularly when that other person is trying to get money from him. On the other hand any advancing like this requires the exercising of a person's judgment and if these things agree,—the inspector's report showing the same thing as his report, then you feel pretty certain that that is about the right figure.

Q. Then you never made an independent investigation apart from the inspector's investigation and report? A. You mean by some third party? 367

Q. Yes? A. Simply that the chief inspector, the man in charge, would also make his inspections from time to time, so that there were two of our men.

Q. So that there were two in your organization checking on this job, is that correct? A. There was one regular man on this job, who would visit the job once a week, and the other man would visit the job whenever any question came up, and he would probably visit it at longer intervals anyway, but checking on the jobs as he did, he could not spend as much time as the one whose particular building that was. 368

Q. Would you say that the man who had this particular job in charge spent more than one day on the job? A. In a week?

Q. Yes. A. No, I would not.

The Court: I suppose in the beginning, there was not need of so much inspection. As the work advanced, the amount of the inspection increased, the time of making inspections would increase of course?

The Witness: When that building is in steel, you can almost make the inspection from the street, and count the number of tiers; when the building gets enclosed, then you have to see whether the bathtubs are installed and the light fixtures are installed, and things of that kind, and that of course takes longer. But an inspection would not take, as a rule, as much as a day. It was more like two or three hours. 369

370 Q. Did you ever inspect a job yourself, Mr. Braislin? A. Not during construction.

Q. And what you have just stated as to time which an inspection would take, that is just based upon something that somebody else has told you? A. No, I have inspected jobs, and I also know how many reports a man would turn in to me in a day, and if he spent all day on this building, he couldn't make any other report.

Q. Did the reports of the inspector on this job, Mr. Schermerhorn, come to you? A. After they had gone through Walters' hands.

Q. In other words, the report was first sub-
371 mitted to Mr. Walters and after Mr. Walters digested it, he passed it along to you? A. Exactly.

Q. Did Mr. Walters initial or mark on the report that he had examined it? A. As a rule, he would give me his estimate on the percentage of completion of the entire building, and would initial it.

Q. Maybe we misunderstand each other, Mr. Braislin. Are you talking about the report upon which an advance was based? A. No, I am only talking about one kind of inspection report and that is a sheet which divided into columns. One of them is in evidence there, a blue sheet, and it
372 gives the estimate of the inspector of the percentage of completion of each trade, and then the estimate of the completion of the entire job.

Q. Then we did misunderstand each other, because I was talking of the ordinary report which the inspector would make.

The Court: You mean the daily report?

Q. The daily report. I understood you to say, Mr. Braislin that you knew or that you had an

idea how long it would take to make an inspection, 373
that is, a daily inspection, because the reports came to you? A. That is his report.

Q. Did he submit a report which came to you after every visit made by him? A. No, but every visit that a man made to the building, he would fill out a column on one of these sheets. That constituted his report; that is the percentages of the various trades. He did not render a report which he wrote out in spelling; but he had been on the job and found this, that and the other thing done; that was our method of reporting.

Q. So that if an advance was made by you once a month, and an inspector had made reports once 374
a week, you would not see the four reports, would you? A. Yes, I would see the whole four reports,—I would see them when I made that inspection, but each report would not come to me and be examined by me every time it was made. I would see them all ultimately, yes.

Q. You would see them altogether, and not separately, is that right? A. Exactly.

Q. Now, there is a letter which has been offered in evidence—I show you Plaintiff's Exhibit 12, in which Mr. Walters has written to say that the "samples of face and court brick have been approved"; do you claim that the brick that was 375
approved is not the brick which went into this building, Mr. Braislin? A. I don't think so.

By the Court.

Q. What do you mean? You do not claim it or you don't think the fact is so? A. I think the brick that was approved was brick that went into the building.

Mr. Murray: I call your Honor's attention to Schedule B-15.

376 Mr. Schenck: I have stated to Mr. Murray that that claim of that particular item was being withdrawn.

By Mr. Murray.

Q. Who is Mr. Fox? A. Frank Fox is that?

Q. Yes. A. He is a vice-president of The Prudence Company, also president of Realty Associates.

Q. Where is his office? A. 162 Remsen Street, Brooklyn.

Q. That is where your office is? A. Not now. It was while this loan was being advanced.

377 Q. Was that your office in February of 1932? A. Yes.

Q. Do you know if Frank Fox had anything to do with this loan or the construction work? A. Not actually, no.

Q. Do you know why it was that Frank Fox was the one who verified the claim, and not yourself or someone familiar with the case? A. No.

Q. You were familiar with the matter, were you not, at the time, in February, 1932? A. Yes.

Mr. Murray: Will you give me Exhibit 13, please?

378 (Document handed to counsel.)

The Court: If you are going to withdraw any of these items, I think they should be submitted to him. Let Mr. Murray have them, if possible, before tomorrow morning.

Mr. Schenck: Yes, we will give them to him tonight. I do not want to preclude Mr. Murray from cross examining him and bringing out any discrepancies that he sees fit to go into, but after all, Mr. Braislin did not prepare the original schedules. The revised

schedules have been prepared after a very careful check and investigation; it has been an enormous job. 379

The Court: Yes. I am sure that in this case Mr. Murray has not succeeded in attacking the credibility of this witness at all. I may say that I have been very favorably impressed by this witness. He has answered questions put to him frankly and there is no sense in going far afield and I suppose that is not Mr. Murray's intention at all.

The Court: I think you better let Mr. Murray have your revised schedules and we will suspend now until tomorrow until ten-thirty. 380

Mr. Schenck: If your Honor please, following the program indicated last night, we have given to Mr. Murray these revised Schedule A and Schedule B. They are somewhat below, in amount, the totals of the other schedules; that is, so far as incompletion items are concerned, and items of departure. These revisions consist in a reduction of our claim, rather than an increase of our claim.

Mr. Murray was good enough to say that he would go over these items, and make a specific denial in regard to them, or if there were any that he could eliminate from our case by either not denying or admitting it would, I think, limit the length of the trial of the case. 381

Mr. Murray: I think I can in many instances, after our investigation, say that we can not dispute the reasonableness of the charge made against The Prudence Company.

The Court: All right.

382 Mr. Schenck: Then, if I may, for the purpose of definiteness, ask that Schedule A be marked for identification and Schedule B also be marked for identification—

The Court: Yes.

(Marked respectively Plaintiff's Exhibits 84 for Identification and 85 for Identification.)

Mr. Judd: We have included in Schedule A all payments made by The Prudence Company in completion of the building, not only those which were in Schedule A before, but
383 those which were in paragraph 37 of the complaint, such as insurance, taxes, and supervision fee; so that all the payments will be in a single list, and I think that will be more convenient.

The Court: Yes.

Mr. Judd: That means that there are just three separate items to be considered: Schedule A of payments; Schedule B of omissions, and the item of lost interest, which was testified to by Mr. Braislin yesterday.

The Court: All right.

384 ———

GORDON S. BRAISLIN resumed the stand.

Cross examination (continued) by Mr. Murray.

Q. Were you able to ascertain more definitely, Mr. Braislin, the date when Mr. Walters left the company? A. No; I did not know you wanted it more definitely than I had it. I could telephone this morning and get it.

Q. Will you find out by tomorrow morning, Mr. Braislin, and that will be all right? A. All right. I will be glad to do that, sir. 385

Q. Is Mr. Billsborrow still employed by the company? A. Yes, he is.

Q. Now, as respects the operations carried on at this building, was Mr. Walters and his assistants—were they the people who were familiar with the details thereof? A. Yes.

Q. Did you from time to time acquaint yourself with the details of the work? A. Only as those things came up in our committee meetings, with respect to the plans or specifications, and applications for changes. 386

Q. Was there any rule in force in the inspection and engineering department that the department should familiarize itself with plans and specifications filed for the granting of a loan? A. I want to make sure that I understand: Do you mean after the loan was granted, or after the letter of acceptance was signed?

Q. Yes. A. Yes, plans and specifications would then be sent to the inspection department, and in a general way, at least, they would go over them, yes.

Q. Was there any rule which you, as head of that department, had put into effect regarding that matter? A. No; I did not know of any rule. They were, of course, expected to do whatever they could. We wanted to see as good a building put up, in any case, as we could get. 387

Q. What check, if any, was made by the company, as to whether or not the borrower was complying with the provisions of the building loan agreement? A. Our only check was these inspectors. Of course, they handled a good many build-

388 ings. We had, at one time, I think, as many as oh, one hundred and twenty building loan operations going on at once.

Q. How many inspectors did you have? A. We had, I think, four—five at one time.

Q. Did you know Mr. Schermerhorn? A. Yes.

Q. What qualifications did he have? A. He had been with the company for oh, I guess, eight or nine years, and had been in a similar job all that time. Beyond that, I do not know what he had done before that time.

Q. But during his eight or nine years with the company, his duties were to inspect buildings, is
389 that right? A. Yes.

Q. Was there any other inspector at any time during the course of this work who inspected this particular job, other than Mr. Schermerhorn? A. Aside from Mr. Walters and Mr. Billsborrow, not that I know of.

Q. Are you familiar, Mr. Braislin, with whether or not on these particular specifications, which were the specifications filed with you originally, the contemplated building could be erected, or whether it would have been necessary to draw more detailed specifications? A. No, I could not answer that.

390 Q. Do you know that as a matter of fact there is not included, in these particular specifications, specifications which were subsequently prepared for the contractors who did different types of work, such as heating and plumbing? A. No. You see, my total contact with those specifications was when those applications for changes came before our committee, and all the results of those were put in writing, and I think are for the main part in those letters that are now in evidence.

Mr. Murray: I might say at this time, your Honor, that if I knew that Mr. Walters or some other gentleman from the Inspection Department was going to testify I would reserve a lot of questions which I might otherwise ask Mr. Braislin. Yet I do not want to bind the plaintiff in any way to guarantee that they are going to produce Mr. Walters. 391

The Court: What is your position with respect to that?

Mr. Schenck: Our position is that we intend, after Mr. Braislin, to put Mr. Grad, the architect on the stand. We should then put Mr. Lukach, of Bing & Bing, who made the inspection and superintended the completion, on the stand. We shall then put Mr. Zilber on the stand, who will estimate the value of the departures from plans and specifications. Beyond that our plans are a little indefinite, but I think I shall very probably put Mr. Schermerhorn upon the stand; I have not decided that yet. But I do not at the present time, as a part of our affirmative case, intend to put Mr. Walters on the stand. 392

Mr. Murray: You understand I do not insist that you do it at all, Mr. Schenck.

Mr. Schenck: That is perfectly all right. We have nothing in the way of surprise, and I think I can say if the production and giving of testimony through Mr. Schermerhorn would give Mr. Murray the opportunity that he desires to go into the details of how inspections were made and all that, we should put Mr. Schermerhorn on the stand. 393

The Court: Was Mr. Schermerhorn in touch with the specifications from the time that they were submitted to you?

394 The Witness: He was, yes.

The Court: Then that would cover it.

Mr. Murray: As long as anybody is going on the stand who is familiar with the specifications, I shall not bother to go into the details with Mr. Braislin.

Mr. Schenck: The extent of Mr. Schermerhorn's acquaintance with the specifications in his inspection I would prefer be left to proof. My understanding of that situation is a little bit different from a detailed knowledge of plans and specifications. I am perfectly willing to state it, but I am not advancing it ar-
395 gumentatively.

The Witness: Well, that is true; he was not on this committee.

Mr. Schenck: My purpose as to this inspection is to show that it advised the company of the general stage of the work. My understanding of it is that the inspection was not to check up as to whether the borrower was conforming to plans and specifications, that that was not feasible; that the work with regard to the plans and specifications would be covered up from one day to another, and that the
396 only purpose of the inspection was the general stage of the job so far as progression and justification for making an advance of the loan. That is my understanding of the matter.

I do not want any misunderstanding of it, but if Mr. Schermerhorn is placed upon the stand by us and if on cross examination by Mr. Murray he does not show what Mr. Murray desires in the way of knowledge of plans and specifications, I do not want to have Mr. Murray say that he would have preferred to

have continued his cross examination of Mr. Braislin. 397

Q. Mr. Walters did practically all the communicating with the borrower while he was with the company, as regards materials and such like going into the building; isn't that so, Mr. Braislin? A. Yes.

Q. I show you Plaintiff's Exhibit No. 17, which is a letter from Mr. Haas to the Prudence Company, attention of Mr. Walters, assuming to confirm a conversation had at a conference attended by Mr. Walters, and in which he enclosed two folders of pottery showing the various fixtures 398 proposed to be put in the building, and ask whether that was the usual manner of corresponding between the two companies (handing witness)?

Mr. Schenck: I do not think that the question is quite fair. We have had on this particular subject of waiver placed in evidence all of the correspondence that I know of, and now for him to give Mr. Braislin one instance and ask if it characterized the mass I think is not quite proper cross examination.

The Court: The witness knows what to say about that. 399

A. To tell you the truth, I am at a little loss to know what to say. I would not say that was usual. I would say in this instance that rather than relying on specifications the Central Park Properties had decided simply to refer to some particular type of fixtures shown in a booklet, and might be referring to a design as well as quality, and for that reason did it that way.

400 Q. As a matter of fact don't you know, Mr. Braislin, enough about this job to know that in most instances there is nothing in the original specifications as regards the particular type of material to be installed, other than probably that it was to be of first quality, good quality? A. No, I am hardly in a position to testify about that, because, as I say, my contact with this thing was on this committee, and we decided their applications for changes which were explained to us, and we decided them there. I suppose I would have a hard time even remembering those.

401 Q. If the Central Park Properties went to the trouble of presenting to The Prudence Company samples of the actual material which was going into the building, didn't they comply with more than the specifications? A. Well, I do not know just what you mean by that.

Q. I mean this: assume that it will appear here that so far as the original specifications are concerned the Central Park Properties could have used in numerous instances any one of numerous types of material. Assume that. And then assume that the Central Park Properties in instance after instance takes up with The Prudence Com-

402 pany the particular type of material which it has in mind for the installation into this building. Would you say they were endeavoring to do what they could with you to put up a proper building? A. I would say that if the Central Park Properties submitted an exact sample of something that they were going to put in the building, then they were extending every courtesy to us in that particular respect.

Q. Then as I understand it you do not claim the Prudence Company had any right to require

Central Park Properties to submit to The Prudence Company the different types of material which were going into the job? A. If those materials complied with the specifications that we had accepted, then if they comply with those I would say they were doing everything that they needed to do. 403

Q. If you discovered during the course of the job that there were materials being installed therein which did not come up to your ideas of the building contemplated, you would have refused to advance at certain times, would you, unless the material was changed? A. We would certainly have made our complaint about it, yes. 404

Q. And Central Park Properties was entirely dependent upon your determination, whether you would pay an advance and in what amount, at any time? A. I do not think that is quite a fair way of putting it, because any party to a contract of course is dependent upon the other party carrying out the terms of the contract. I mean we have to live up to something if we advance them money, certainly. On the other hand, we have to depend on Central Park Properties carrying out what they are supposed to do also.

The Court: Aren't you going really into the function of the Court, after the facts are in? This is really a supposititious and hypothetical examination, the last few questions. 405

Mr. Murray: Of course, Mr. Braislin had charge of these advances, your Honor, and claims have been made here regarding the interpretation of the building loan agreement which are not in conformity with my ideas.

406 The Court: After all, it is not the interpretation of the parties which will govern here, is it?

Mr. Murray: It might.

Q. You at no time, Mr. Braislin, informed the Central Park Properties that Mr. Walters had no authority to pass upon questions which might be brought up by the Central Park Properties, did you?

Mr. Schenck: I object to this on the ground that the rights and obligations in the matter are specific in the contract—that any waiver
407. must be in writing, by an officer of the company, and that whether or not Mr. Walters was informed of this or that has nothing to do with the case. It is entirely immaterial.

The Court: I overrule the objection.

Mr. Schenck: Your Honor will grant me an exception.

The Court: Yes.

A. I think that we informed the Central Park Properties of the existence of the committee which passed on any changes in specifications or plans. I know that it was referred to in letters, I think
408 by both ourselves and Central Park Properties, and I know there were specific written waivers or acceptances or modifications referred to that committee. I think that was understood all around.

Q. But if there were any such cases, Mr. Braislin, where the committee passed upon changes, you did not write to the Central Park Properties, did you? A. No, that is true. Mr. Walters did that.

Q. Mr. Walters wrote to the Central Park Properties? A. That is correct. 409

Q. So far as the Central Park Properties knew, if Mr. Walters did approve this, that or the other thing without making any mention of the committee having passed upon them, is there anything which you wrote to the Central Park Properties giving them notice that they would have no right to rely upon that approval of Mr. Walters? A. I believe the contract itself says that waivers will be in writing, and I believe that the Central Park Properties in at least a few instances requested waivers in writing for that reason. I think that, too, was known by both parties. 410

Q. Will you search and find any correspondence from the Central Park Properties in which they ask for a specific written approval of a change? A. I think there are confirmations asked for in these letters that are introduced in evidence.

Q. Have you in mind that there were any other such letters than the ones which have been offered in evidence already? A. I do not know of any others.

Q. When you made that statement that you had knowledge of certain instances where the Central Park Properties did certain things in that respect, were you referring to the exhibits already in evidence? A. Exactly. 411

Q. And you were not referring to any other papers? A. No, at that time I was referring to these exhibits in evidence.

Q. Who had the power in The Prudence Company to approve the type and quality of fixtures to be installed in the building? A. This committee that I have referred to.

412 Q. Did Mr. Walters have the power to approve fixtures without first taking it up with any committee? A. No.

Q. And that is so even though the approval of the fixtures would not constitute any change in the plans and specifications? A. That gets a little difficult there, again, because if something is in accordance with the plans and specifications it would have been approved; I do not see how anybody would have the right to disapprove it.

Q. Do you know whether the committee did as a fact approve the materials mentioned in that Exhibit No. 19 (handing witness)? A. These
413 bathroom fixtures, they came up before the committee, yes.

Q. Do you know whether the hardware which went into the building was approved? A. I know that there were samples of hardware which were submitted to the committee, and if they went into the building I assume they were, yes.

Q. Who would determine whether or not the hardware which was approved went into the building? A. Well, our representatives there were the inspectors, of course, and we depend—if the Central Park Properties submits to us samples of hardware and says, "This is what we are going
414 to put in", and we approve those samples, we don't expect them to sneak some other samples in, of course; we expect them to live up to what they agreed to do.

Q. But you expected your inspectors to check to see that that material went in, did you not? A. In so far as they were able, of course, yes.

Q. Now, in Schedule B of the complaint, Item 11, you made a claim for $29,500, the claimed difference between the value of hardware actually

installed, and the amounts the specifications called for as hardware expense. Now, at the time that complaint was drawn, did you know as matter of fact whether the hardware which was going into the building had been approved? A. I don't know. I did not prepare those schedules. In fact, I do not think I personally knew that claim was being made about the hardware. 415

Q. Well, were you not the one man who was familiar with this job? A. No. After this building loan—the advances had been completed, then my contact with this job ended for about two years, until about a year ago I picked up the management of the building; but I had nothing to do with the completing of the building. 416

Q. Well, you had to do with the making of all advances, did you not, Mr. Braislin? A. Yes.

Q. And when did your contact with this job stop? A. After the advances were completed.

Q. After the advances were completed? A. Yes.

Q. But was there anyone else in the organization, The Prudence Company, more qualified than you to say whether or not, when they were preparing a claim, in the matter of hardware Central Park Properties had or had not complied with their contract? A. Of course. 417

Q. Who? A. Mr. Lukach, for instance, who examined this building in great detail, superintended the completion of it, who obviously knew by comparing the specifications and plans, exactly what was there, and after weeks of examination would know exactly what was missing.

Q. Was he with The Prudence Company at the time the building was being erected? A. No. He is not with The Prudence Company now. He is

418 with Bing & Bing. They completed this structure.

Q. So that Mr. Lukach prepared the claims based upon a reading of the specifications, is that right, and examination of the building? A. Together with any waivers.

Q. Do you know that this item or this claim for difference in value of hardware has been withdrawn now? A. Of course I do.

Q. And if the matter had been taken up with you, would you not have been able to give information which would have been of assistance on the matter? A. Well, I don't know. You see, there are a great many jobs, and if I had made a
419 study of it, possibly I could. I know the reason this was withdrawn last night was that I went over this item, and found out that the samples had been submitted. I think that we all agreed we did not want to make a claim that we thought should not be made; and no claim has been made that we do not think should be made.

Q. Those papers were in The Prudence files all this time, were they not? A. I assume so.

Q. And in whose possession? A. I don't know.

Q. Was there any particular file in which papers concerning this job might be found? A. There is a file on this property, yes, but these
420 papers would not be there. These papers would probably be in the possession of the lawyers.

Q. Did you keep a file on this job? A. I personaliy?

Q. Yes. A. No.

Q. Did the engineering and inspection department keep a file? A. Only in so far as their own inspection reports are concerned.

Q. Is it your recollection now that the hardware had been approved? A. My recollection is

that samples of hardware were submitted and were approved. 421

Q. And it was decided that what went into the building was in accordance with the samples, is that right? A. As far as I know.

Q. In Exhibit No. 27, dated April 10, Mr. Walters wrote to the Central Park Properties approving the following materials and equipment: Copper radiators, Electrolux gas ranges, Copperior copper-bearing sheet-steel, hardware, Speakman brass fittings. I call your specific attention to the item of Electrolux gas ranges. That is presumably a mistake, is it not, Mr. Braislin, because there were no gas ranges inserted in the 422 building? A. It may refer to gas refrigerators.

Q. Exactly. Electrolux gas refrigerators. And there is no question about that in your mind, is there? A. I don't think so. I am not—I can not testify much as to these individual items. I mean I can not remember all these separate things very much.

Q. Electrolux gas refrigerators were put into the building, were they not? A. There, again, I will not swear to it, though I believe so.

Mr. Schenck: It is a small matter, but in reading Plaintiff's Exhibit No. 27, Mr. 423 Murray said that Mr. Walters had approved. The expression is "we had approved". I do not want any improper or inaccurate recitals to go on the record.

Mr. Murray: All right.

Q. Now, I will call your recollection to a talk which you had with a Mr. Race in November. A. Yes.

Q. 1930. A. Yes.

424 Q. When you testified yesterday, you said "I told him exactly what our reports had shown". Now, what do you mean by that? Did you tell him the percentage of completion? A. I told him then, with that report before me, whatever percentage we showed in any trade; whatever the report I had before me did show. I do not recollect now whether he asked about any special trades, but if he did, I told him just what we had.

Q. I show you now Plaintiff's Exhibit No. 45 for Identification, and ask you whether that is the report which you had before you at the time you spoke to Mr. Race (handing witness)? A. I am
425 inclined to think no. I am inclined to think that I had the report showing the percentages of the various trades—because that is more complete than this one.

Q. Is this what you mean by a percentage of the different trades, Mr. Braislin (exhibiting paper to the witness)? A. Yes.

Q. Is there any date on that? A. Yes; "11/20". That is November 20 is the first one. There were sheets before this one. This is only a part of it. There was a sheet corresponding to this date, I think.

Q. Would it be your recollection, then, that this,
426 being Plaintiff's Exhibit No. 50, for Identification, is the report which you had before you at the time you spoke with Mr. Race? A. A report similar to that, but it was a report for an earlier week.

Q. Do you remember telling Mr. Race then the building then was 99 per cent. completed? A. No, I don't remember that. I don't think I—I think I told him exactly each trade,—whatever the report we had showed, in its percentage of completion.

Q. Do you know whether any computation was ever made by you or for you to show at any particular time the percentage completed of all the work? A. Yes, each week, I think—I don't know whether it is on that report, but on these other reports Mr. Billsborrow or Mr. Walters would compute and initial their estimates of the completion of the entire job. Of course these things are the estimates of the inspectors and Mr. Walters and Mr. Billsborrow. It is a calculation that they make mentally on the job, and they give their opinion. That is all it is. 427

Q. So in addition to percentage estimates of each individual item, there would be one percentage estimate of all the items together, is that correct? A. Yes, all of them being estimates of the men. We never made any representation that they were anything else. 428

Mr. Murray: I now offer in evidence, your Honor, Plaintiff's Exhibits for Identification Nos. 45, 46, 47, 48, 49, 50, and 63, 64 and 65.

The Clerk: Shall I mark them, your Honor?

The Court: They may be received. They can be received as one exhibit. They are all the same kind of papers, are they not? 429

Mr. Murray: These are the reports.

The Court: The periodical reports of the inspectors?

Mr. Murray: Yes.

The Clerk: They are already marked for identification with various numbers, and we can strike off the "identification".

The Court: But they are received as defendants' exhibits.

430 The Clerk: Then, they will be Defendants' Exhibit B.

(Marked collectively Defendants' Exhibit B.)

Q. Now, on December 5, Mr. Braislin—December 5, 1930, was a final payment to Central Park Properties. Was that payment made by you? A. It was made by me on the advice of Mr. Mark, our general counsel.

Q. Now, prior to the date of making that final advance, you and representatives of the Central Park Properties had discussions, did you not, as
431 to how much there should be retained from the final advance? A. I think those discussions were all held with Mr. Mark. I had discussions with the Central Park Properties people, of course, all the way through this loan, and particularly toward the end, because we were receiving constant demands from them for the final payment, and from the time that I got that first demand, I referred this matter to Mr. Mark for his advice, and he told me—

Q. Never mind that, Mr. Braislin. A. All right.

Q. When demands were made upon you for the
432 final advance, did you tell them that the building was not entirely completed and, therefore, you would not give them the final advance? A. Well, it is a little hard for me to recollect what language I used. I do know that we negotiated, if I may put it that way, to advance as small an amount of money at that time as we could, yes.

Q. If, of course, the building had been entirely completed, you would have had no hesitancy in making the final advance, is that right? A. If it

was completed in accordance with the building loan agreement, I do not see any reason for hesitating, no. 433

Q. And it was a very material question at that time in your mind how much work remained to be done to complete the building, in accordance with the plans and specifications, was it not? A. Well, that is material with a lot of other things that are material—such as the certificate of occupancy, which the Central Park Properties was using as the basis of their final advance requests.

Q. Well, you did not comply with that request when it was made? A. Do you mean by that advance all the money as soon as the certificate of occupancy was issued? 434

Q. Yes. A. Well, obviously not. The records speak for that.

Q. Yes. Then, whether you should make a final advance would be determinable or dependent upon whether the building was completed in accordance with the plans and specifications? A. That I will not agree with. Whether I made the final advance at that time, at that point, depended upon whether Mr. Mark told me to or not, because this got into a question of law, that I was not going to decide.

Q. Well, before the matter ever got into Mr. Mark's hands, is it not the fact, Mr. Braislin, that you, based upon reports and inspections which had been made, decided that they were not entitled to the full amount at that time? A. I do not think that is quite a fair way of asking me—asking it of me. I will put it this way: prior to the issuance of the certificate of occupancy, I calculated the advances, and advanced the money; and when the demand for a final advance came in to 435

436 me, then it was that I consulted Mr. Mark. Now, from then on I acted on his advice.

Q. Well, after the certificate of occupancy was issued, you made further advances from time to time, did you not? A. Yes.

Q. Upon what basis did you act in making those advances? A. It was a question largely of negotiation with the Central Park Properties, and coming together at as low a figure as we could.

Q. Well, during those times were you taking into consideration the status of the building, the status of the work at these times? A. I was taking into consideration everything that I knew, of
437 course; and I was taking into consideration also the fact that Mr. Mark had instructed me to advance the money in that way—in as small amounts as I could get an agreement to.

Q. And in endeavoring to find what that amount would be, did you not discuss the question of what work remained undone? A. I think, undoubtedly.

Q. And did you prior to December 5, make special efforts by means of inspections, to determine just what the exact status of that building was, so far as completion was concerned? A. I think we were being as careful as we could, yes.

438 Q. Now, Plaintiff's Exhibit No. 76, this certificate, which was executed by The Prudence Company, made provision in there for what is called the depositing with Prudence Company of $75,000 until all the work of completing the building on the premises, except the final coat of paint had been completed to the satisfaction of The Prudence Company (handing witness). Do you know why there was the specific mention of paint—painting in there—the final cost of painting? A.

May I just glance through this, because I have not read it lately? 439

The Court: Yes.

The Witness (after examining paper): Yes. I think that paint was separated from other items of completion because, as was brought out here earlier in this case, some of the painting you would have to wait quite a little while for; especially the final coat. Special tenants would want special colors in finishing their apartments.

Q. And after reading that, does it not refresh your recollection that $25,000 of that $75,000 was allocated to the cost of completing the painting? 440 A. Certainly allocated out of this $75,000. As to whether that was supposed to be the item of the cost of completion of the painting, I do not know.

Q. Well, the company had before it at that time Mr. Billsborrow's reports, did it not? A. Yes, Mr. Mark had them.

Q. And at or about this time had not Mr. Billsborrow made a report that the cost of finally completing would be about $43,000, inclusive of the paint? A. I believe he had; that is, that that was his estimate. 441

Q. And you depended upon Mr. Billsborrow, who was keeping you advised as to the condition? A. Well, I have answered that, I think, yesterday. In all these advances and in considering all these things I and, I think, Mr. Mark took into account those reports, the requests of Central Park Properties, and the building loan agreement. These things had to be an exercise of judgment, of course.

442 Q. Mr. Mark was vice-president? A. And general counsel.

Q. Now, is it not your recollection, Mr. Braislin, that for, oh, say, two weeks prior to December 5, a detailed investigation and inspection of this building was made? A. We asked Mr. Billsborrow, in addition to making his usual percentage reports, to also make out a written report—which are those which we have put in evidence—which would be a little more readable for Mr. Mark, for instance, than a percentage report.

Q. Will you look at those papers, which are now marked Defendants' Exhibit B, and see if you
443 can find there the particular report which you have in mind now, which Mr. Billsborrow made just before December 5 (handing witness)?

(Informal discussion, off the record, between Mr. Murray and the witness.)

The Witness: I think that is it (handing paper to Mr. Murray). I think that is all part of the same.

Q. Now, on November 28, 1930, Mr. Billsborrow made to you, Mr. Braislin, a report. Would you say it was because of this report that $75,000 was retained from the final advance? A. It certainly
444 had an important part in it, yes.

Q. When did The Prudence Company learn that Central Park Properties had left this job? A. Well, the leaving of that job was a rather gradual process. It did not take place on any one day. For instance, that report, the last part of December, showed that there were still some men working there—maybe only a few men working on one or two trades. I should say that there was a withdrawal of men over a period of a couple of weeks,

beginning about the last week of December or the last two weeks. 445

Q. Under what circumstances did this gentleman from the appraisal department go to this property late in December? A. I don't know whether I asked him to go or someone else, but simply to keep as close a check on this thing as we could, because we too were wondering what was going to happen to the job.

Q. Did he make any report to show when finally there were no workmen on the job? A. No further reports other than those that are in evidence, that I know of.

Q. In Mr. Weller's report, Plaintiff's Exhibit No. 53, for the week ending December 27th he states that seven daily inspections were made by him. That would, then, be for the seven days before December 27th, would it not? A. I judge so; yes, sir. 446

Q. And he states that one day and one night watchmen have been on the premises continually, and that these men he understands are in the employ of The Prudence Company. Do you know whether that was the fact, that he has his information correct? A. It probably is. It must be. I do not know the exact date, but I know we did put on a night watchman and a day watchman, or continued the employment of those, I do not know which it was. 447

Q. Was there any arrangement at that time between you and the Central Park Properties for you to take possession of the building? A. There was an arrangement about possession. I think it was around the 7th or 8th of January. There is a letter in evidence that refers to an agreement

448 like that. It is the one you asked whether we had yesterday. That is the agreement I refer to.

Q. That is a specific agreement that was mentioned in a letter—a specific written agreement? A. That was about the first week or ten days of January.

Q. Prior to that was there any oral arrangement between Central Park Properties and The Prudence Company that The Prudence Company should take possession? A. Well, not that was made with me. Whether Mr. Mark and Mr. Haas or somebody had an arrangement like that orally I do not know.

449 Q. Did you find a specific agreement regarding the occupancy? A. No.

Q. Did you look? A. I have not. I will make a note of that.

Q. Would you be good enough to make a search, Mr. Braislin? A. Yes.

Q. I show you Plaintiff's Exhibit No. 56, which is a letter dated January 7, 1931 (handing witness), from Mr. Race to you, referring to an earlier conversation in November, I believe. A. Yes.

Q. Did you communicate with him by telephone
450 or otherwise in answer to this letter? A. I do not recollect that I did.

Q. Do you know at that time, January 7th, that the Central Park Properties Company was off this job? A. I knew through those reports, as to the number of men working and so forth. That letter, incidentally—oh, before that was replied to, four or five days after it, a conditional bill of sale was filed against the premises by Otis Elevator Company, and we have immediate notice of that, of course. I think that is the only notice at that time,

in writing at least, that was given. As to the tele- 451
phone conversation, I don't remember.

Q. The next communication which you had with the Fidelity and Deposit Company of Maryland after Mr. Race's letter of January 7th was Plaintiff's Exhibit No. 57, dated January 13th? A. Yes.

Q. In which you mention the fact that a conditional bill of sale of Otis Elevator Company had been filed. A. Yes.

Q. Either at that time or any other time prior to that did you inform the Fidelity and Deposit Company that the Central Park Properties were off this job or that the work had not been com- 452
pleted?

Mr. Schenck: I think that that is a notification, and a matter of argument.

The Court: That is a matter of argument. I mean other than through this notice. You may answer that.

A. May I have the question?

Q. (Read by stenographer.) A. I don't recollect any notice to the effect that the men were off the job at that time. As soon as we knew that the work was incomplete to the extent that it was, we 453
notified— As to giving notice, I simply wanted to state that as soon as our company did learn of the exact completion of this job and the amount of work still to be done notice was given to the surety company immediately; the next day, I think.

Q. I show you Plaintiff's Exhibit No. 62 (handing witness), dated February 25th, and ask you whether or not that is an exact copy of one of Mr. Billsborrow's reports? A. I can answer it to this extent. Of course we knew pretty well at this

454 time that the reports that we had had from Mr. Billsborrow were pretty—underestimated the amount of work to be done still quite a good deal. At this time we did not know exactly how much. But I know that because I had that doubt and did not know how much of this still had to be done I made these pretty general at this time, until I had a more exact report by somebody who would make a very thorough and probably long examination of the building.

Q. When did you begin to doubt Mr. Billsborrow's reports? A. On Lincoln's Birthday of that year Mr. Guthman and Mr. Greve, Mr. Waterman
455 and Mr. Pender I believe went over to this building, went through it, and they discovered at that time there was a great deal more work to be done than Mr. Billsborrow's report showed; and it was the day after that that the letter of the surety company was drafted, and I think sent the 14th of February.

Q. In that earlier letter no mention was made of any specific items? A. No, that was just the first notice we had, and we sent that notice right away.

Q. Mr. Billsborrow was not with these gentlemen whom you have mentioned? A. No, I think
456 not.

Q. On that inspection? A. No.

Q. But you retained Mr. Billsborrow in your employ after that time? A. Yes.

Q. Do you know how long the inspection of these gentlemen lasted on that day? A. No, although it took a good part of the day. I know they spent quite considerable time there.

Q. What was the next step taken by the Prudence Company as regards an inspection of this

building after the examination by the gentlemen whom you mentioned a moment ago? A. My recollection is that we took steps immediately to determine exactly the amount of work that still had to be done, and decided to have Bing & Bing make that examination. I believe that notice was given to the surety company that that examination would be made, and invitation extended for them to have their own representative there to go over the work with Bing & Bing's men. I think that following that report demand was made that it be finished, and that that was not done I think we went ahead ourselves. 457

Q. Do I understand that you kept in contact with the work up there from that time on? A. Did I? No, I did not. 458

Q. Were all reports made to you by Bing & Bing's men respecting the work to be done? A. No.

Q. The reason I ask that is that it was you, Mr. Braislin, who in subsequent letters informed the defendants of what you claimed. A. That is right. Of course, all those letters are corporate letters. I signed as an officer of the company.

Q. You have stated here, Mr. Braislin, if I am not mistaken, that the building was not completed until October 1, 1931. A. That is an approximate date. 459

Q. Is that based upon information received by you from other people or is that based upon your own personal knowledge? A. No, that is based largely on information received from other people. I think Mr. Lukach can give exact and first hand testimony on that.

Mr. Murray: I offer in evidence a letter dated November 6, 1930, from The Prudence

460 Company, R. E. Billsborrow, to Central Park Properties.

(Marked Defendants' Exhibit C.)

Mr. Murray: I offer in evidence a letter dated November 7, 1930, from Central Park Properties to Prudence Company.

(Marked Defendants' Exhibit D.)

Mr. Murray: I offer in evidence letter dated November 13, 1930, from Central Park Properties to Mr. Mark.

(Marked Defendants' Exhibit E.)

461 Mr. Murray: I offer in evidence a letter dated April 10, 1930, from Central Park Properties to Prudence Company.

The Court: Mr. Murray, if these exhibits that you are now offering are not necessary to the cross examination of this witness, then they should properly be reserved for your case. They may be received. We will not undo what we have now done, but I am only suggesting it as to other exhibits you may have in mind.

Mr. Murray: That is perfectly all right,
462 your Honor. Except as to this particular last letter I would like to question the witness.

(Marked Defendants' Exhibit F.)

Q. I show you a letter dated April 10, 1930, from Central Park Properties to Prudence Company (handing witness). In your investigation is there anything to doubt that such a letter was delivered to The Prudence Company, Mr. Braislin? A. No, I have no reason to doubt it. I would not

have received it, and I thought we had a complete file of the letters we had received; but it is entirely possible one might not be there. 463

Q. I show you a specification or instrument stating, "Specification for heating and ventilating" (handing witness), and ask you whether that is a copy of the specification mentioned in Exhibit F? A. I would not know. I would not know whether it had or not.

The Court: That may be marked for identification.

(Marked Defendants' Exhibit G, for Identification.) 464

Redirect examination by Mr. Schenck.

Q. Mr. Braislin, you stated in answer to a question asked you yesterday by Mr. Murray that you knew how long these different inspections would take from the number of reports that one inspector would hand in to you per day. A. Yes.

Q. Can you tell us merely from the practice approximately how many such reports there would be? A. Well, of the larger jobs probably three in a day; if the jobs were not so very large, maybe four.

Q. I show you Plaintiff's Exhibit No. 84, for Identification, constituting Schedule A, payments made by The Prudence Company in completing the building, and I also show you Plaintiff's Exhibit No. 85 for Identification, the schedule of the claimed departures and variances from the specifications (handing witness), and ask you whether or not when you made the final advance of the loan you knew of those items on those two schedules? A. No, I did not. 465

466 Q. I ask you whether or not when you received from Mr. Billsborrow his additional reports in the latter part of February you knew of those items? A. No.

FRANK GRAD, called as a witness on behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. Schenck.

Q. What is your business, Mr. Grad? A. Architect.

467 Q. Where is your office? A. Newark, New Jersey.

Q. In September, 1929, what was your business? A. Architect.

Q. And where was your office at that time? A. Both in Newark and in New York.

Q. Tell us very generally your experience as an architect—very generally. A. I am practising twenty-eight years now, and I have designed many of the large structures of every type and description.

Q. Business buildings? A. Yes, sir.

Q. Office buildings? A. Office buildings, hotels,

468 theatres.

Q. You have done considerable work for the City of Newark? A. I did, sir.

Q. During the last few years approximately what per cent. of its entire architectural work have you done? A. About twenty-five or thirty million dollars. Over that.

Q. There is a certain Lefcourt Building in Newark that you designed? A. Yes, sir.

Q. What is the name of that? A. It is the Lefcourt-Newark Building.

Q. And you drew the plans, prepared the specifications, and also superintended the construction of that building, did you? A. I did, sir. 469

Q. You drew the plans and prepared the specifications of this building which we are now calling the Essex House? A. Yes, sir.

Q. I show you this roll of plans which have been marked Plaintiff's Exhibit No. 5, and ask you if those are the plans—you need not unroll them unless it is necessary—whether those were the plans which you drew for the Essex House? A. They are, sir.

Q. And those were the plans submitted as the basis of the building loan? A. Well, I would 470 prefer to look at those, because there were so many changes and I want to see whether it was the Syndicate Subscription.

Q. Yes. I call your attention to the stamp on the outside if that would be of any assistance to you (indicating). A. That is right.

Q. Those are the plans? A. That is right.

Q. I show you Plaintiff's Exhibit No. 4 and ask you if those are the specifications prepared by you (handing witness), and which together with certain amendments or additions by The Prudence Company were the basis of the loan? A. Yes, sir; they are. 471

Q. Mr. Grad, did you at the beginning of this work also superintend the construction of the building? A. I did.

Q. While you were superintending the construction of the building, that is, being the architect in superintendence of construction, how many men, architects, engineers or assistants, did you have under you? A. For this particular job or all around?

472 Q. For this particular job. A. About twelve men.

Q. At that time had you also opened a branch office in New York? A. Yes, sir.

Q. And that branch office was opened not entirely but mainly, at any rate, in relation to this work that you were doing in the Essex House? A. That is right.

Q. How long were you on that job so far as superintendence was concerned? A. Well, the job started some time in October and the last day that I was on the job was June 4th or 5th. I believe it was June 5th.

473 Q. When you were last on the job in your capacity as supervising engineer, Mr. Grad, what was the general state of the building? Now very generally. A. Well, the building was what we call enclosed. Most of the brickwork was completed. The floor arches were finished almost to the top floor. They also started to lay some partitions, set some partitious, on the second and third floor.

Q. If you will just tell us very generally the different stages of construction of this particular building or any building of that size. What is the first stage? A. Well, the first thing was done
474 here was the excavation, the completion of the excavation, which was rock in this particular instance.

Q. And then what is the next general stage of the construction? A. Well, foundations are being prepared, and then columns erected for the skeleton steel frame.

Q. And after the columns are erected what is the next stage? A. Floor arches, floor construction, concrete floors being poured.

Q. The slabs across? A. That is right.

475 Q. And the general iron work? A. And they begin the enclosure of the brickwork on the outside at the same time.

Q. And your last connection with the job as the supervising architect was after the building had been enclosed? A. Enclosed; yes, sir.

Q. Generally speaking beyond that stage of construction of such a building the following stages are plastering, painting, hardware and detailed finishing? A. Yes, more or less of finishing the interior.

Q. After you left the job as its supervising architect what was your next connection with the 476 job, Mr. Grad? A. The next thing I heard from a Mr. Lukach representing Bing & Bing.

Q. And did you in the Spring of the following year, that is of 1931, go over the building and do certain work in regard to inspecting and examining the state of the work? A. I did.

Q. More particularly in relation to its conformity or lack of conformity with your plans and specifications? A. That is right.

Q. I show you a letter from Mr. Haas addressed to you, dated the 21st of May, 1929, and ask if you received that letter (handing witness)? A. Yes, sir. 477

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 86.)

Q. I show you now a letter from Central Park Properties, addressed to you, dated the 4th day of October, 1929, and ask you if you received the original of that, and whether the attached docu-

478 ments of two pages were attached at the time you received it (handing witness)? A. Yes, sir.

Mr. Schenck: I offer this in evidence.

(Marked Plaintiff's Exhibit No. 87.)

Q. I show you now a letter from Central Park Properties addressed to you, dated the 7th of April, 1930, and ask you if you received that letter (handing witness)? A. I did.

Q. I call your attention now to certain writing in blue chalk or crayon at the bottom of the letter, and ask you in whose handwriting that is (indicating)? A. This was my assistant, Mr. Jack
479 Sanger.

Q. And when that letter came for you or to your individual attention, was that note by Mr. Sanger upon that letter? A. Yes, sir.

Mr. Schenck: I offer that in evidence.

Mr. Murray: I do not think the note should go in, but only the letter.

The Court: No, I will exclude the note.

Mr. Schenck: I am going to inquire further in regard to the note, your Honor.

The Court: Well, the note is there on the exhibit, and if Mr. Sanger testified or if it is
480 otherwise identified and explained, perhaps the ruling may be different; but for the moment it is excluded.

(Marked Plaintiff's Exhibit No. 88.)

Q. After you received this letter of the 7th of April which is now Plaintiff's Exhibit No. 88, did you have any talk or conference with Mr. Haas? A. I did, sir.

Q. And who was Mr. Haas? A. Mr. Haas was 481
one of the officers of the Central Park Properties.

Q. Was the talk or conference somewhere around the date of this letter or shortly after the receipt of this letter? A. I believe it was the very next day.

Q. Yes. And what was your conversation at that time? A. Mr. Haas in this letter asked me to eliminate certain items of bronze work; and I told him that the building as designed—that is, the lobby, especially, if some of this bronze—these bronze gates were omitted, it would spoil the appearance of the entire job.

Q. And what did he say? A. Well, after a con- 482
siderable talk with Mr. Haas, he has agreed to replace some of those gates, which he told me he was going to order.

Q. You say "replace some of them". All of them or some of them? A. I believe just only about fifty or sixty per cent. of them.

Q. Mr. Grad, I show you now a certain report purporting to have been made by you on the Essex House, which report bears date the 6th of July, 1931—

Mr. Murray (Interposing): May I see that paper, please? 483

Mr. Schenck: Yes. (Handing paper to Mr. Murray.)

Q. (Continuing.) And I ask you if that is a copy of the report made by you on or about that date after the inspection of the building in 1931, concerning which you have testified (handing witness)? A. It is.

Mr. Schenck: I ask that it be marked for identification.

484 Mr. Murray: I do not know that that is the proper way of proving these items, your Honor—by a report from Mr. Grad.

The Court: It is offered only for identification.

Mr. Schenck: Yes.

Mr. Murray: Oh, I beg your pardon.

Mr. Schenck: I am going through each item, and attempt to prove them individually, before I offer the report in evidence.

Mr. Murray: That is all right.

Mr. Schenck: And then the report will be merely offered for clarification.

485 The Court: As a summary?

Mr. Schenck: Yes.

(Marked Plaintiff's Exhibit No. 89 for Identification.)

Q. Now, Mr. Grad, in this report, Plaintiff's Exhibit 89 for Identification, you have marked in the margin a certain index or notes in reference to the different items, to the plans and specifications. I wish you would hold this during the following part of your testimony (handing witness), and as we come to the different items, I shall ask you more particularly in regard to them.

486 Now, we were discussing the matter of these bronze screens referred to in the Central Park Properties' letter of April 7, Plaintiff's Exhibit No. 88; and you stated that some of the bronze screens, after conference with Mr. Haas, he had said he would order and put in, but that he did not state that he would put in all. A. That is right.

Q. I think that item is No. 37 upon your list. Will you refresh your recollection by turning to

that item, and state what you found on the building at the time of your inspection in 1931, in respect to the screens called for by your plans and specifications? A. Well, the ornamental bronze and glass screens detailed on drawings Nos. 202 and 203 were omitted from the locations between the palm room and the entrance lobby; from the breakfast room to the entrance lobby; from the entrance lobby to the foyer and the men's and women's lounge; the elevator lobby and stenographer's room; the elevator lobby and the fountain lounge. 487

Q. Now, when you had this talk with Mr. Haas was any reference made to The Prudence Company in relation to these bronze screens or doors? A. Yes; I remarked to Mr. Haas that in case those items should be omitted, that he better get in touch with The Prudence Company or the loan people, or else they may object. I did that almost on every occasion where a change or omission was requested. 488

Q. And what did Mr. Haas reply to that suggestion of yours? A. Well, that they would take that up with The Prudence Company.

Q. I show you now a letter from Central Park Properties addressed to you, dated the 9th of April, 1930, and ask you if you received that (handing witness)? A. I did, sir. 489

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 90.)

Q. I show you now a certain memorandum dated the 6th day of March, 1930, and at the top it says "A. E. Lefcourt Realty Holdings, re Building Central Park Properties", and ask you if you re-

490 ceived that memorandum—that document on or about its date (handing witness)? A. I did, sir.

Q. Who is C. W. Lush? A. Mr. Lush was in the employ of Mr. Lefcourt—one of the engineers in his employ.

Q. When you say "of Mr. Lefcourt" you mean on this particular job? A. Yes.

Q. Now, Mr. Grad, can you tell me whether or not this memorandum of the 6th of March, 1930, was a memorandum received in the ordinary course of your supervision of this job, from the Central Park Properties (handing witness)? A. It was, yes.

491 Q. And had you, before that time, had talks and conferences with Mr. Lush? A. I did.

Q. And had those conferences been in the presence of Mr. Haas—some of them? A. Yes.

Q. And you say that Mr. Lush was an engineer? A. Yes, sir.

Q. In what respect was he an engineer? A. On general construction.

Q. In general construction? A. Yes.

Mr. Schenck: I will have it marked for identification.

492 (Marked Plaintiff's Exhibit 91 for Identification.)

Q. Mr. Grad, I show you now a letter from Central Park Properties by Mr. Haas, Secretary, addressed to you, dated the 17th of March, 1930, and ask you if you received that letter (handing witness)? A. I did.

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 92.)

Q. Now, please refer to your report, Item No. 88, and tell us in respect of this letter to Mr. Haas how many closets were omitted from the building at the time you examined it in the spring or early summer of 1931? A. Well, there were closets omitted out of at least 90 per cent. of the rooms. My recollections are that there were at least 60 or 65 rooms on the second floor; that is, in the help's quarters. 493

Q. And was that called for by your plans or by your specifications? A. It was called for by the plans.

Q. Were the plans, after the receipt of this direction from the Central Park Properties, changed? A. Yes, sir. 494

Q. By you? A. Yes, sir.

Q. Now, I have asked you to bring over your drawings, and what I call the original plans; that is, the plans on cloth. Can you, just in this particular case, to show us the method of working, point out on your cloth sheet the change that was made in that plan in relation to these closets? A. I believe I can. It was the second floor plan.

Q. I show you now the second floor plan, sheet No. 4, and ask you if that is your original cloth plan (handing tracing to the witness)? A. It is.

Q. And whether you can point out upon it the change that was made in relation to these closets? A. Yes, sir. In every instance where there was a bedroom or servant's room, you will find an erasure in the corner, and that is still in existence, where the closets were taken out. 495

Q. That is, these lighter portions on the plan (indicating)? A. Yes.

Q. And they constitute the changes eliminating the closets? A. You can see those lighter spots on here—the erasures (indicating).

496 Q. That is the light spot in each case indicates an erasure? A. That is right.

Q. Of the designation of a closet? A. Yes, that is right.

Mr. Schenck: I offer this plan in evidence.

The Court: Those changes were made on floors other than the fourth floor, were they not?

The Witness: No; only on the second floor.

The Court: Were those the servants' quarters?

The Witness: Yes.

497 The Court: Is that the second floor?

Mr. Schenck: Yes, your Honor.

The Witness: Yes.

(Tracing marked Plaintiff's Exhibit No. 93.)

Mr. Murray: May I see that, please?

Mr. Schenck: Yes (handing tracing to Mr. Murray).

Mr. Murray: This is one of the items, your Honor, of which I received notice last night.

The Court: This is not on the original

498 schedule.

Mr. Murray: No, it is not on the original schedules at all.

Mr. Schenck: That is true. It is not on the original schedules.

The Court: We will take an adjournment now until tomorrow.

The Court: Have you come to any agreement about the Schedules A and B?

Mr. Murray: I am going to do the best I can, your Honor. I have not prepared any

written matter, but I would like to dictate to 499
the stenographer just what my position is on these respective items, if that is satisfactory.

Mr. Schenck: If Mr. Murray could state the item, so that on our copy we can make the marks.

Mr. Murray: Yes, that is what I am going to do. As to Item 1 of Schedule A, we will admit that blue prints were drawn and that we will not raise the issue of the reasonable cost of those blue prints.

As to Item 38, which is the second one on the amended Schedule A, we admit as to subdivision (a) that the work was done and that 500
the cost here was the reasonable value of that work.

Right here I might say, your Honor, that we do not of course waive the claim that there was any necessity for this work.

The Court: Oh, I understand. That will be true of all your concessions.

Mr. Murray: Yes.

Mr. Schenck: Just for the purpose of clarity, it is understood that Mr. Murray in stating these details is not waiving any of his defenses. It is merely in regard to amounts.

The Court: That is my understanding. 501

Mr. Schenck: In these two schedules.

The Court: Not merely the amounts, but the fact that the work was done and the material supplied. He is not contesting the amounts, but he waives nothing on the question whether the defendants are legally liable.

Mr. Schenck: Yes.

Mr. Murray: As to subdivision (b), in that same paragraph, we admit the work and the

502 reasonable value. As to subdivision (c) we admit the work and the reasonable value.

As to Item 2 in Schedule A, subdivision (a), we deny any knowledge as to the work done or the value of the work done. As to subdivision (b) we admit that probably those bills were furnished and that they are reasonable in value.

The Court: And that the work was done?

Mr. Murray: And that the work was done, yes.

As to Item 3, we admit as to subdivisions (a) and (b) that the work was done and that
503 the value was reasonable. As to subdivision (c) we deny any knowledge of whether the work was done, or if done its reasonable value.

As to Item 17, subdivision (a), we admit that the work was done and that the amount was the reasonable value thereof. As to subdivision (b) we deny any knowledge that the work was done, but if the work was done the reasonable value thereof was probably $225.

As to Item 4, we admit each of the subdivisions, that the work was done and that the cost thereof was the reasonable value thereof.

As to Item 18 we admit the payments.

504 The Court: You admit that the current was furnished and the amounts paid?

Mr. Murray: We admit that the current was furnished and that that amount was paid.

As to Item 5, we admit a payment to Otis Elevator Company of $14,500, but deny that it was in finishing the work and that $14,500 was the reasonable value of finishing the work. As to subdivision (b) of Item 5 we deny any knowledge as to whether the work

was done or as to the value thereof if it was done. 505

As to Item 6 we deny any knowledge as to subdivision (a), as to whether the work was done and what its reasonable value was. We admit subdivision (b) of Item 6, and that the work was probably done and that $125 was the reasonable value thereof.

As to Item 7 we admit the doing of the work in the two subdivisions, and its reasonable value.

As to Item 9 we deny any knowledge as to whether the work was done, but if the ball-room floor and platform were entirely scraped 506 and finished, the reasonable value of the labor would be $210.

As to Item 10, subdivision (a) we admit that mirrors and glass were replaced, but deny any knowledge as to the amount thereof or the reasonable value. As to subdivision (aa) we deny any knowledge as to whether the work was done or its value. We admit the doing of the work in subdivision (b) of Item 10, and its value. We deny any knowledge as to subdivision (c), of Item 10, as to whether the work was done or its value.

As to Item 11 we admit the furnishing of 507 the material in subdivision (a) and its value. We admit the same as to subdivision (b). We admit the same as to subdivision (c). We admit as to subdivision (d) that $406.01 was paid to Rosenthal Hardware Company, but deny the necessity for the payment; but admit that the hardware was of the reasonable value of $406.01. We admit the furnishing of

508 the material and its reasonable value mentioned in subdivision (e) of Item 11.

As to Item 19 we admit that if firing tools were supplied, that $25 was their reasonable value, but we deny any knowledge as to whether they were supplied.

As to Item 7, insurance, we admit the paying of the insurance premium and that that was the reasonable value for insurance covering the period stated.

As to Item 12 we admit subdivision (a), as to the furnishing and the value thereof. As to subdivision (b) we have no knowledge of
509 what work was done, whether it was done, and if so what its reasonable value was. In the same way we deny any knowledge of subdivision (c), as to the furnishing of the steel door or its value if furnished.

As to Item 37, we admit the furnishing of the hardware and its value.

As to Item 20 we deny any knowledge as to whether work was done and what its value was.

As to Item 13 we admit as to subdivision (a) that the fixtures were purchased of a
510 value of $598. As to subdivision (b) we admit the purchase of fixtures of the reasonable value of $321.20.

As to Item 27 we deny everything except that certain painting was done, and deny that the reasonable value of the painting done was the amount specified. As to subdivision (b) of that Item we deny any knowledge as to whether the work was done, and deny that the amount was the reasonable cost of recalcimining 154 ceilings.

As to Item 41 we admit that the plaintiff paid these amounts specified in the Item, but deny any knowledge of whether or not they were reasonable. 511

As to Item 30 we deny any knowledge as to the amount of labor in subdivision (a) or the value of the labor, and admit as to subdivision (b) that the material was furnished and that its reasonable value was $55.

As to Item 31, subdivision (a), we admit that the shower curtains were furnished and that the amount specified is the reasonable value thereof. The same as to shower curtain pins in the same subdivision. We admit as to subdivision (b) that the missing parts were furnished and that the prices indicated were the reasonable values thereof. We deny any knowledge or information as to subdivisions (c) and (d) whether the work was done and the material was furnished, and if it was whether the cost thereof was reasonable as specified. 512

As to Item 29 subdivision (a) we deny any knowledge as to the furnishing of the gas mask and cabinet, but admit that if it were furnished the price thereof is the reasonable cost. As to subdivision (b) we deny any knowledge or information as to the doing of the work or its value if done. As to subdivision (c) we admit the furnishing of the parts and that the price was their reasonable cost. 513

As to Item 32 we deny any knowledge or information as to the doing of the work or its reasonable value.

As to Item 33 might I have this clear? It says, "Insulating of steam and incinerator pipes".

514 Mr. Judd: Insulating of steam and incinerator room.

Mr. Murray: That is what I thought. We deny any knowledge as to whether the work was done, or if done its reasonable cost.

As to Item 34 we admit that payments were made for steam as alleged in this item.

The Court: The proof is in as to that anyhow.

Mr. Murray: Yes. As to Item (4), we deny any knowledge or information as to the furnishing of the services or their value.

As to Item (5) we—these are already in,
515 too, your Honor, (5) and (6), the taxes.

The Court: You do not deny the payments, do you?

Mr. Murray: We do not deny the payments. As to Item 24 we admit the payments therein specified.

As to Item 39 we deny any knowledge or information as to the work done or its value.

As to Item 16, subdivision (a), we admit that the work was done and that the reasonable cost was probably $925. As to subdivision (b) we admit that some work was done but deny any knowledge as to the amount
516 thereof or the reasonableness of the charges therefor. As to subdivision (c) you have already proved the payment.

Mr. Schenck: Yes.

Mr. Murray: Is there anything else that you would like to have me say as to that, Mr. Schenck?

Mr. Schenck: You do not deny the reasonableness of it?

Mr. Murray: No, I do not deny the reasonableness. Really, Schedule B, your Honor, has to do with omissions which are concededly omissions and substitutions; and I do not see how that in any circumstances would come under the rule which requires denial the furnishing of it or to take up specifically the furnishing of materials and labor. 517

The Court: Whether it comes under the rule or not, it has to be faced here by way of proof or pleading. If it is possible to admit that these items were missing, it is going to shorten the proof.

Mr. Murray: Oh, you mean to admit as to their being missing? 518

The Court: Yes; and so far as substitutions are concerned, admit as to those or deny, so that we do not have this trial protracted by unnecessary proof.

Mr. Murray: No, I do not want that either. I will go through them, and will admit so far as I can, and deny where I can not admit.

As to Item 38 we admit the omission of bronze screens. Of course, your Honor, "Omission" carries with it—carries right in the word itself—a conclusion that it was required. 519

The Court: No. If you are fearful of being precluded by the use of the term or any inference to be drawn therefrom, then your admission may be, in effect, this: that there were no such items at the time of the alleged completion of the building.

Mr. Murray: Yes. I can say this: that there were certain bronze screens which were not installed on the lobby floor; but they do not say here—

520 The Court (Interposing): You say here, without admitting, that they should have been.

Mr. Murray: Yet they do not say how many bronze screens there were.

The Court: Well, they gave you the value of them.

Mr. Murray: We deny any knowledge as to the value. We admit that there were certain glass and bronze screens not inserted, but we deny any knowledge as to their value.

As to Item 40 we admit that racks and shelving were not placed in the checkroom;
521 that mail and key racks and shelving were not placed in the room clerk's office; that file racks and wood screens were not placed on the counters of the desk space; and that counter and six phone booths were not furnished; and that wood folding doors of private dining rooms were not installed; but we deny any knowledge as to the reasonable cost of installing or doing these several pieces of work.

As to Item 2 we admit that Kellastone carpet strips were not installed, but deny any knowledge as to the reasonable cost of in-
522 stalling them.

As to Item 2 (b) we admit that wood stools and aprons were not installed on 2335 windows, as alleged, but deny any knowledge as to whether the difference in cost between fireproof wood stools and metal stools is the amount stated.

As to Item 3 we admit that sanitary cove was not placed in certain cement base, but

deny any knowledge as to the amount of feet or as to the reasonable value of installing. 523

Mr. Schenck: I think you skipped subdivision (c) of carpentry.

Mr. Murray: Oh, yes, excuse me: As to Item 2, subdivision (c), we deny that wood flooring was not installed in the private dining rooms.

As to Item 43 we will admit that 56 closets were not installed in servants' rooms, but deny any knowledge as to the reasonable value of installing those.

As to Item 4, subdivision (a) we deny any knowledge as to whether the work was 524 omitted or its reasonable value.

Subdivision (b) of Item 4, we deny any knowledge as to the amount of electrical work unfinished, and its reasonable value.

As to Item 21 we admit that the mail chute was not paid for, and admit that the cost thereof would have been $4,000; but deny any knowledge as to the rental arrangement.

As to Item 22 we admit that what was paid for medicine cabinets was not the amount which was stated in the original specifications as allowance for medicine cabinets; and that 525 that difference is the amount stated.

As to Item 27 we deny that outright.

As to Item 28 we deny any knowledge either as to the work or the value thereof.

As to Item 30, subdivision (a), we admit that some plastering was not done in the barber shop, but deny any knowledge as to the value thereof.

As to subdivision (b), we admit that Keene cement wainscotting was not installed in cer-

526 tain places called for by the plans and specifications, but as to the extent of that we have no knowledge, and have no knowledge as to the difference in price between plaster and cement.

As to Item 31 we deny any knowledge as to the first four items therein—the first five items, rather, and their reasonable cost. We admit that there was no liquid soap dispenser system, but deny knowledge what the reasonable cost of that would be.

We deny any knowledge as to the siamese connections or what their cost would be.

527 We admit that radiators were not placed in the barber shop, but deny that $625 was the reasonable cost thereof.

We deny any knowledge as to valve-charts, both as to whether they were inserted, and their value if not inserted.

As to Item 32 we deny any knowledge or information.

As to Item 44 we admit that the speed of the express elevators was 600 feet per minute, but deny any knowledge as to the item claimed to be the damage item, as to whether

528 that is reasonable.

As to Item 7 we deny any knowledge or information as to this item, both as to whether there was a substitution and, if so, the difference in value.

As to Item 8 we deny any knowledge or information.

As to Item 10 we admit that 681 bedroom mirrors were installed plain and not bevelled; but we deny any knowledge as to the reason-

ableness of the amount for removing, resil- 529
vering and resetting.

As to Item 12, we deny any knowledge or information as to this item.

As to Item 13, we admit that the difference between the amount actually spent for lighting fixtures, and the so-called cash allowance stated in the original specifications, was the amount stated, $26,900.

As to Items 16-A and B, we admit that the number of fireplaces and mantelpieces therein specified were not installed, and that the original specifications provided for a cash allowance of $150 for each fireplace and mantelpiece under subdivision (a), and $250 for each fireplace and mantelpiece under subdivision (b). 530

As to Item 14 we deny knowledge or information.

As to Item 33, subdivision (a), we admit that radiators were not installed in store, but as to the number which were not installed, and as to the cost of installing radiators, we deny any knowledge or information.

As to subdivision (b) of Item 33 we deny any knowledge or information. 531

As to subdivision (c) we deny any knowledge or information, except that we will admit that if a one-year supply of gauge-charts was purchased, that $25 would be the cost thereof.

As to subdivision (d) we admit that no radiators were installed in interior bath rooms, but deny that $25,000 is the reasonable value therefor, and deny any knowledge as to the cost of cutting and patching plaster to install radiators, as stated in subdivision (e).

532 As to Item 35 we deny any knowledge or information, as to the subdivision (a).

As to subdivision (b) we deny any knowledge or information.

As to Item 39 we deny any knowledge or information. I will change that to a denial, but admit that probably the fair cost of polishing would be $111.60, if the polishing had not been done.

As to Item 36, subdivision (a), we admit that some tile was not furnished, was not installed, but deny knowledge as to the value of that tile which might have been necessary.

533 As to subdivision (b), we admit that soap dishes were installed, but that combination soap, glass and tooth brush holders were not installed in 6981 guest baths; but deny any knowledge as to the difference of $1,030 in value.

As to subdivision (c), we deny any knowledge or information.

As to the fee of general contractor or architect, we deny any knowledge or information.

The Court: All right. Now, the witness may resume the stand.

534 ———

FRANK GRAD resumed the stand:

Direct examination (continued) by Mr. Schenck.

Q. If you will turn on your list, Mr. Grad, to Item 2, I show you now a letter of Central Park Properties, addressed to you, dated December 7, 1929, and ask you if you received that letter (handing witness)? A. Yes, sir.

Mr. Schenck: The list that Mr. Grad has 535
in his hand, has been marked for identification yesterday.

The Court: Yes.

Mr. Schenck: It is his report of his investigation, and he has marked, so as to facilitate our putting in the proof—has marked in the margin certain items which correspond to the numbers on Schedules A and B.

The Court: Yes.

Mr. Schenck: And in my notes of his examination I have put those items opposite the particular letters that I am going into now, and it is merely for the purpose of facilitating 536
our handling of the matter. There is nothing evidentiary in it at all.

The Court: I understand.

Mr. Schenck: The particular item that I am inquiring about now deals with mantelpieces.

The Court: Yes. In which schedule does that fall, and can you perhaps save some effort by identifying it in the schedule?

Mr. Schenck: Yes. This is on Schedule B, on next to the last page—mantelpieces.

The Court: Item 16 of Schedule B? 537

The Clerk: Are those schedules in evidence yet?

The Court: No. They are marked for identification only.

The Clerk: They are not in evidence.

The Court: No.

Q. Now, have you that letter? A. Yes.

Q. And you stated that you received that letter? A. I did.

538 Mr. Schenck: I offer it in evidence.

The Court: These schedules that have been referred to in your admissions and denials, the clerk calls my attention to the fact that they are marked only for identification. They ought to be in evidence; otherwise, they are—

Mr. Murray (Interposing): I thought Mr. Schenck was going to amend his complaint to put these amended schedules in as the amended complaint.

The Court: Yes, I thought so too.

539 Mr. Schenck: Yes. If you will allow me, I wish now to offer in evidence Schedules A and B—not as proof of the items or the value of the items, but merely for the purposes of the record.

The Court: That is right.

Mr. Schenck: So that we may have a definite basis for our admissions and denials.

The Court: Yes. Those will be received in evidence.

(Plaintiff's Exhibits Nos. 84 and 85 for Identification, received in evidence.)

540 Mr. Schenck: Was that last letter marked —that last offer?

The Clerk: No.

Mr. Schenck: Then, please mark it now.

(Marked Plaintiff's Exhibit No. 94.)

The Clerk: That is a letter of December 7, 1929.

Q. Now, in relation to these fireplaces, when you made your investigation in the late spring of

1931, you ascertained that those had not been sold and delivered? A. Yes. 541

Q. Now, if you will turn on your list to Item No. 64—and this is with regard to substitution of terrazzo for marble—

The Court (Interposing): Item 39, Schedule B, is that it? On the last page?

Mr. Murray: That would be, rather, Item 14, would it not, your Honor, on Schedule B?

The Court: Terrazzo, 1395 square feet on first floor not polished.

Mr. Murray: This is an omission on the third page, next to the last item. 542

The Court: Oh, yes, I see.

Q. I show you now a carbon copy of a memorandum, with the printed designation of "C. W. Lush", dated the 29th of April, 1930, and ask you if you received that particular document (handing witness)? A. I did.

Mr. Schenck: I am not going to infringe upon your Honor's ruling, and I will ask that it be marked for identification, and merely use it to refresh the witness's recollection.

The Court: Yes.

Mr. Schenck: I ask that this be marked for identification. 543

(Marked Plaintiff's Exhibit No. 95 for Identification.)

Q. Mr. Grad, after receipt by you of Plaintiff's Exhibit No. 95 for Identification, did you make any changes in your plans in relation to the terrazzo? A. Yes, sir.

Q. As a substitute for marble? A. Yes, sir.

544 Q. Will you refer to page 2 or sheet No. 2 of your original plans and tell us whether or not that change by way of erasure or otherwise appears upon your cloth plans? A. No. My recollection is that there was an amendment or a changed specification and these were not erased.

Q. So that does not appear upon that sheet? A. It would be too much of an erasure.

Q. When you examined the building in your investigation, did you find that that change had been carried out in the building itself? A. Yes, sir.

Q. That is, that in certain places where your specifications had called for marble, terrazzo had
545 been substituted? A. That is right.

Q. What is terrazzo? A. Terrazzo is a composition of a marble dust, cement and sand.

Q. Is it inferior in value and in appearance to marble? A. Yes, sir.

Q. Can you tell us the extent of that substitution, referring to your report if necessary for the detail? A. Insofar as appearance is concerned of course, it makes a lot of difference whether you have a marble border.

The Court: No, the question refers to what is here in the schedule—that in the main din-
546 ing room, dining terraces, palm room, tea room, terrace, writing lounge and fountain lounge. Is that what you mean?

The Witness: Yes, sir; the same thing.

Q. If you will refer to Item 12 upon your report, Mr. Grad, I show you memorandum of the 5th of March, 1930, carbon copy, with the printed designation "C. W. Lush", and ask if you received that particular document on or about that date (handing witness)? A. Yes, sir.

Mr. Schenck: I ask that it be marked for identification. 547

The Court: What item of the schedules does that embrace?

Mr. Schenck: That is in regard to the caulking of the windows. No. 17 of Schedule A on the first page.

(Marked Plaintiff's Exhibit 96 for Identification.)

Q. After the receipt of that memorandum that particular item was omitted from the work, and when you made your inspection in the late Spring of 1931 you saw that it had been omitted? A. Yes, 548 sir.

Mr. Schenck: I shall go no further with that, because that is an item that has been admitted by Mr. Murray.

The Court: You are going to prove the value through other witnesses?

Mr. Schenck: We are going to prove no values through Mr. Grad. Mr. Murray has stated that he regards this item as a reasonable item, so I think that our proof may be very pro forma in regard to that.

Q. I show you, Mr. Grad, copy of a letter from 549 Central Park Properties, Inc., to Otis Elevator Company, dated the 18th of December, 1929, and call your attention to the designation at the left-hand lower corner thereof "C. C. Grad", and ask you if you received that document on or about its date from the Central Park Properties (handing witness)? A. Yes, sir.

550 Q. And you received that in your capacity as supervising architect and as a detail of the work being carried on at the time? A. Yes, sir.

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 97.)

The Court: Mr. Schenck, wouldn't it be possible, in order to shorten this proof, for you to frame a general question, an omnibus question which would enable the witness to testify that he did certain things under instructions from the officers of the Central Park Properties—that is as to one phase of
551 his work—and, secondly, that he made an examination in the Spring of 1931 and he noted the omissions of this, that and the other thing? It seems to me unless you form some such general question as those two that it is going to take an interminable time.

Mr. Schenck: I think it is an excellent suggestion, your Honor, and I think that with the fact that the witness is subjected to cross examination as to any of these questioned items it would facilitate matters considerably if I might be allowed to finish that proof, and
552 also if we could be allowed to follow that same thing in regard to our items of completion and expenditure; because we have the vouchers here, and the bills, and there is no reason for going through a detailed form of proof if we allow our opponent to have all this evidence for cross examination.

The Court: It will certainly succeed in eliminating repetition of the same form of question in respect of all these different items.

But the proof, after all, is going to be the same, except it is going to be given in one answer instead of one hundred and fifty answers. 553

Mr. Schenck: Yes, I think that is an excellent suggestion.

Q. Mr. Grad, you have before you the report of your investigation? A. Yes, sir.

Q. In making that report you had with you your plans and specifications which had been made the basis of the loan? A. That is right.

Q. And you checked the work to see wherein there were items in that work that varied from your plans and specifications? A. That is right. 554

Q. In some cases those changes from plans and specifications had been done while you were the supervising architect on the job, and under directions in various forms given to you by Central Park Properties? A. That is right.

Q. In other cases the changes have apparently been made after you had ceased to be the architect upon the job? A. That is right.

Q. But you have made a list of all of those changes that you ascertained in your inspection? A. That is correct.

Q. And that list is the list that you have before you? A. Yes, sir. 555

Q. Does that correctly state each and every item? A. Yes, sir.

Q. And have you in the margin placed for convenient reference a reference to the particular part of plans and specifications in which the variance exists? A. That is right; page and paragraph.

Mr. Schenck: For the purpose of shortening these items I offer that in evidence as

556 prima facie proof upon the subject, and will turn over Mr. Grad for cross examination, and will be very glad to introduce any further evidence in support of any items questioned, if I may.

The Court: I think that is the way to do it, Mr. Murray. That report will be marked Exhibit 89 in evidence.

Mr. Murray: Of course, there are many items here which no claim is being made for and no mention at all in the—

The Court: That would not increase the claims.

557 Mr. Schenck: I will say there are certain items here which have been crossed out, which have been withdrawn.

The Court: They have been crossed out?

Mr. Schenck: They have been crossed out on this particular sheet, and they have been withdrawn; and I say that I am not making any contention on behalf of any items that are not on Schedule A and Schedule B.

The Court: Yes, that is understood.

Mr. Murray: Of course, your Honor, the difficulty is that so far as incomplete items are concerned, we have now Mr. Grad's

558 statement about certain items which appear in Schedule A, as to many of which we have no knowledge whatsoever.

The Court: It is your privilege to inquire about them.

(Plaintiff's Exhibit No. 89 for Identification now marked in evidence.)

The Court: The Court understands very well the rule of evidence under which this is

admissible. That is to say, the report itself would not be admissible if the witness were to say: "Well, this refreshes my recollection"; and I am sure that it does refresh his recollection as to a number of the items. On the other hand, why do we go through the form of that strict rule, when the report itself summarizes everything and the witness is here for cross examination? 559

Mr. Schenck: It may be in regard to the item of terra cotta that there is a letter here that I may wish to offer in evidence after the cross examination; but with that exception my purpose in putting Mr. Grad on the stand is fulfilled, in regard to these items. 560

The Court: You have closed your direct examination?

Mr. Schenck: Yes, I have closed my direct examination of Mr. Grad at the present time.

Cross examination by Mr. Murray.

Q. Plaintiff's Exhibit No. 4, Mr. Grad, is the original specification prepared by you, upon which this loan of The Prudence Company was made; is that right? A. Yes, sir.

Q. Under what circumstances were those specifications prepared? A. Why, preparing them for a client. 561

Q. Pardon me? A. Under what circumstances?

Q. Yes. A. Well, I was asked to prepare a set of plans and specifications.

Q. By whom? A. By the Syndicate Subscription Corporation consisting of several gentlemen from Philadelphia.

Q. Were you a member of that corporation? A. No, sir. Only for one day, when the title was

562 transferred from the Syndicate Subscription Corporation to the Central Park Properties. For some reason Mr. Lefcourt wanted me to become an officer because he could not get these gentlemen from Philadelphia.

Q. Did you have any financial interest in that proposition? A. Just loaned them some money.

Q. How much? A. $50,000 in cash and an endorsement for $50,000 on a note which I eventually paid.

Q. Did you have discussions with The Prudence Company in regard to the making of a loan to that Syndicate Corporation? A. No, but I was there
563 when the discussion took place with Mr. Toby, then the president of the Syndicate Subscription Corporation.

Q. And those discussions were during the summer of 1929, were they? A. Yes, sir.

Q. And those times these particular specifications were in existence, Plaintiff's Exhibit No. 4? A. Yes, sir.

Q. And the original plans which you saw yesterday, Plaintiff's Exhibit 5, these also were in evidence at that time (indicating)? A. Yes, sir.

Q. And these plans and specifications were prepared, as a matter of fact, for the Syndicate Cor-
564 poration? A. That is right.

Q. And that is why their name appears thereon? A. That is right.

Q. The negotiations with The Prudence Company did not culminate in a loan, did they?

Mr. Schenck: At what time, Mr. Murray?

A. Yes.

Q. To the Syndicate Corporation? A. Well, that I would not know.

Q. Don't you know that the Syndicate Corporation did not get a loan on these plans? A. I know they put up $50,000 with them. 565

Q. Don't you know whether they got a loan from The Prudence? A. No, the Syndicate did not get the loan.

Q. During the negotiations with The Prudence Company was there an estimate of the cost of the construction of the contemplated building in accordance with the plans and specifications prepared? A. An estimate by whom? By contractors, or an approximate estimate?

Q. An estimate by anybody? A. There was a tentative estimate given by Mr. Toby, then the president of the Syndicate Subscription Company, to The Prudence. 566

(Discussion between Court and counsel omitted.)

Q. In the preliminary miscellaneous work specification of these specifications, Paragraph 16, it says: "The general contractor shall include in his estimate the following cash allowance for the features enumerated". In your experience as an architect isn't it a fact that these cash allowances are mentioned in there only for the purpose of arriving at a bid from the general contractor— the total bid? A. In those particular items it is always specified just that way, rather than go into a lengthy detailed specification. For example, as to hardware, what kind of a knob or lock to use for various doors. We generally take an approximate price of one and a half per cent. We know from past experience that the price or percentage of one and a quarter to one and a half per cent. of the total job will cover hardware. Then we leave the selection of this hardware to the owner. 567

568 Q. And if the owner later selects hardware, for instance, which does not cost as much as the cash allowance isn't there some allocation made? A. Yes, sir.

Q. Between the contractor and the owner? A. Yes, sir; that is the very purpose of it, so that the contractor at the completion of the job gives the owner the difference of the amount specified and the amount actually expended. It works both ways. On the other hand, if the contractor or the owner selects hardware that costs more money, he pays the contractor the difference.

Q. Exactly. And this mention of cash allow-
569 ance is a mere estimate of what the particular items will cost? A. Should cost. Not will, but should. We do not know. It is just an approximate item. If the owner so chooses to buy fixtures, for example, lighting fixtures, for a lesser amount, why, that is his privilege. If he chooses to decorate a ballroom like in this particular case he can spend five thousand dollars, he can spend twenty-five thousand dollars.

Q. Exactly. Only I do not see here any cash allowance for ballroom. Do you remember that there was a cash allowance for ballroom? A. That was an after consideration by Mr. Lefcourt,
570 as I recall it.

Q. Is "ballroom" mentioned in this particular specification (handing witness)? A. No, sir; I think we included the entire painting. No, sir; there is no "ballroom" mentioned here.

Q. Many times the estimate in such a specification is put in a year or more before the particular articles are purchased; isn't that so?

Mr. Schenck: I object to this line of cross examination, if your Honor pleases.

The Court: Sustained.
Mr. Murray: Exception. 571

Q. After the actual work of construction started on this building, Mr. Grad, how often did you go to the building? A. I personally went to the job about once a week.

Q. Did any of your assistants go to the job? A. Yes, sir.

Q. And what did you go to the job for? A. Well, just to follow up; the regular routine of work.

Q. Did you have any contract with Mr. Lefcourt for your services on this job? A. Not in writing. 572

Q. Did you have any contract of any kind? A. Yes, sir.

Q. What was it? A. He was supposed to pay me the same amount of fee as he did on the Newark job, which was 6 per cent. of the total cost.

Q. And on that Newark job exactly what services did you perform? A. The usual architectural services. Prepared plans, specifications, and supervised the structure.

Q. When you were performing services in connection with this particular job were you acting 573 as architect for the owner of the building? A. Yes, sir.

Q. Were these the specifications which were used for the construction of the building (indicating)? A. That I could not say. Specifications were rewritten time and again by Mr. Lefcourt's staff of engineers in my office.

Q. And your office? A. And my office and in my office.

574 Q. And wasn't there an entire new set of specifications prepared? A. Well, if you call them new. They were written on new pages, but the substance of the new set of specifications is just a segregation of these specifications which were intended for a general contract and afterwards decided by Mr. Lefcourt or the Central Park Properties to let the contracts to twenty-nine separate contractors.

Q. The details of the different contracts would not have been covered by these particular specifications, would they? A. In substance they would; yes, sir.

575 Q. The details? A. Yes, sir. The detailed specifications.

Q. These are not detail specifications, are they? A. Yes, sir.

Q. These are detail specifications? A. As can possibly be made. Exact size, and concise.

Q. Will you tell me why you were spending so much time preparing other specifications? A. I was not spending any time at all. It was the organization of Mr. Lefcourt, and one of my men always set in with them, and as a result they have rewritten every section two or three times,

576 with the final result that the specification is practically the same. They came right back, with the exception of, to be sure, about seven or eight items in the entire specification changed. I checked them afterwards as to what the change was from this specification to the one that was rewritten so many times. I have it here in court.

Q. Isn't it a fact that you could not build a building on those specifications? A. That is not so. That is positively not so. The building was built, in substance and construction and everything out-

side of the omission according to this specification, or heretofore mentioned. 577

Q. Don't you know that you and the Lefcourt organization time after time, day after day, sat down to prepare sufficient specifications upon which a building could be erected? A. Well, the specifications are here, and we can prepare—as late as last night I took the first six specifications and compared them, for I knew that this question will come up, and invariably there was either one paragraph juggled into another space or a word or two added here and there, but sizes and dimensions and material is exactly identical with the original specifications. These specifications are 578 here.

Q. As the new specifications were being prepared did you at any time tell anybody in the Lefcourt organization that there was no necessity for the new specifications, that these were perfectly sufficient? A. Yes, sir.

Q. For the purpose? A. Yes.

Q. Whom did you tell that to? A. I told that to Mr. Haas.

Q. Are there included in here any plumbing specifications? A. No, sir.

Q. Are there included in here any heating specifications? A. There is a separate set of mechanical specifications. 579

Q. Are there included in here any heating specifications? A. No, sir. But they are separated there.

Q. How many specifications are there upon which the building was erected, which do not appear in here? A. Just the mechanical.

Q. What are the mechanical specifications? A. Plumbing, heating, electric work and elevators.

580 Q. Are these large items? A. Representing about 25 per cent. of the job.

Q. Do you still say that upon these specifications you could have erected the building? A. Why, there was added specifications to this here. The specification was separated from the general to the mechanical, which were in existence at the time, with this specification here.

Q. And in the same way in respect to the plans, new plans had to be rewritten, didn't they? New plans were rewritten? A. Construction plans or mechanical plans?

Q. Both. A. I had nothing to do later with the
581 mechanical plans. They were given out to a mechanical engineer by the Syndicate Subscription Corporation. On the architectural plans, however, there were changes made from time to time, on the same plans.

Q. During your connection with the work was there any time that any changes of any nature were made that you were not advised of? A. I do not believe so. Everything was brought to my attention.

Q. And when changes were suggested didn't you have some voice in whether or not the changes
582 should be made? A. I always consulted and advised with Mr. Haas and Mr. Lefcourt.

Q. And did you always compare the suggested changes with what was provided by the original specifications, to see whether the changes were in conformity therewith? A. Had to.

Q. Why did you have to? A. Why, because some changes were suggested, and one item that would materially interfere with the carrying on of

the work, with another trade, that Mr. Lefcourt perhaps had not thought of. 583

Q. The mechanical work you say is about 25 per cent. of the total work? A. As a rule the mechanical work runs 25 per cent.

Q. Do you know whether you had anything to do with the hardware or lighting fixtures or medicine cabinets or apartment refrigerators so far as the choice of the type was concerned? A. No, sir; I was off the job by the time of the finishing.

Q. When were you off the job? A. I was off the job, to be exact, June 5th, 1930.

Q. And how is that date so clear in your mind? A. By my records which I have here in court. A 584 daily inspection made by the inspector or by myself always marked what was doing on the job.

Q. A daily inspection made by your office? A. Yes, sir. Well, when I say daily, sometimes we were there twice a day, sometimes only twice a week. But every time a superintendent goes on the job he brings back a memorandum and makes a typewritten record of the progress of the job. Every day is marked.

Q. What were the circumstances under which you left the job? A. Well, I could not get my money just as I felt I was entitled to it. By that 585 time, by June 5th, I had spent close on to eighty thousand dollars in salaries and overhead, and all I have got from Mr. Lefcourt was thirty thousand, and I kept on asking for monies and I could not get them, and I finally decided that I will have to either quit or get some money.

Q. And did you start an action against Mr. Lefcourt? A. I did, the very next day, or two days afterwards.

586 Q. That action was defended? A. Well, we settled it. It did not come to court.

Q. And in that action did you claim or make any claim for the cost of the work which had been done up to the time that you left the job? A. The cost of the work? I don't recall that.

Q. What was the nature of your claim? A. Well, I would have to look that up. The nature of the claim was, I believe, three and three-fifths per cent. for plans and specifications, and the remainder of two and two-fifths for supervision up to a certain point. Now what the amount was up to that certain point I cannot recall.

587 Q. Do you remember whether or not you claimed that when you left the job in June three million dollars had been spent in construction? A. I would not be sure as to those figures unless I look up my records.

Q. Have you your records here? A. No, sir; not on my claim. I didn't think it was necessary.

Q. Can you readily find out? A. I would call up my lawyer, I guess, he is in New York here, and find out.

Q. How much money did you ultimately receive for your services? A. Altogether?

588 Q. Yes. A. About $60,000.

Q. Now, I would like to have you tell a little more in detail, Mr. Grad, just what you did, so far as supervision was concerned. You have testified that you were retained to supervise the work. Now, just tell me what you did, so far as supervision was concerned? A. Well, the principal object of supervision on this particular job, on account of being done for a builder, who was the contractor himself, was, while we have been

inspecting the work, whether it complies with the plans and specifications in a general way. The primary thing was to follow up the mechanics, and see what details were needed, see that the general work was carried out, as to heights, quality of material, and so forth, as though we were doing work for a private firm. 589

Q. Did that require actually going to the job and inspecting the work—going in there? A. Yes; it was the run of architectural supervision.

Q. Did you ever, at any time on that job, object to this or that particular piece of work? A. Yes, on many occasions.

Q. In what respect—on what particular occasions? A. Well, for instance, we had—there were several mentions made about the brick work. I spoke to Mr. Haas, and brought him out to the job—that I did not think that the brick work was as nicely laid up as it should be. He agreed with me, and told me that he would take up the matter with the mason contractor. 590

Q. You thought the mason contractor was not doing the work satisfactorily, did you? A. That is right.

Q. Now, whom did you see connected with the Central Park Properties at this time, when you say you were on the job? A. A Mr. Kiely, who was superintendent, I believe; he was the general superintendent on the job. 591

Q. Did you see anybody else from the Lefcourt organization on the job? A. Well, sometimes I met Mr. Banfield, their general superintendent, who had charge of all of his work.

Q. Is this Mr. Banfield (indicating)? A. Yes, sir.

592 Q. Did you at any time during the construction of the work, when you felt that the plans and specifications were not being followed, communicate with The Prudence Company to that effect? A. No, sir, I did not.

Q. Was it your duty to see that the building was erected in accordance with the plans and specifications? A. My duty was only to the owner, who paid me, but not to The Prudence Company.

Q. Did you know that The Prudence Company had made a loan? A. Yes, sir.

Q. To the owner? A. Yes, sir.

Q. Now, in the specifications, Mr. Grad, Plain-
593 tiff's Exhibit No. 4, there is mention of a cash allowance of $38 per thousand, I believe, for brick. Is that your recollection? A. That is right.

Q. How did you know what was actually paid for the brick? A. I did not know what was actually paid for the brick. May I correct this statement here? Something just came to me mind: I got that from my superintendent, the superintendent on the job, who told me that he had a knowledge of it, and he has made this report, but I personally—

Q. (Interposing.) He has made this report? A. The report to me as to the $35 or $38, or what-
594 ever it was.

Mr. Schenck: We are not claiming, as I have stated, any valuations through Mr. Grad.

The Court: I understand.

Q. But is this your superintendent's report or your report? A. This is my report, but the superintendent reported to me that, to his knowledge, there was so much paid for the brick, and that was put down there just in that way.

Q. How much of the information contained in this Plaintiff's Exhibit No. 89 is information which you acquired from your superintendent? A. Oh, five or ten per cent. of the items—whatever I was not sure about, I had my assistants look it up, which is the customary way of doing work in the office. 595

Q. Now, here, under 62, you state, "Brick costing $33 per thousand was used instead of the $38 per thousand brick specified on page 3, paragraph 5 of the masonry specification"? A. Yes.

Mr. Schenck: We are not claiming that item, your Honor.

Mr. Murray: You did claim it originally, in the complaint. 596

Mr. Schenck: That is all right. Go ahead, if you want to.

Q. Now, the $33 per thousand information came to you from your superintendent, you say? A. That is right.

Q. Do you know where he got that information? A. He got the information the same place I did later on—by the salesman who sold the brick to Mr. Haas.

Q. Do you claim that because brick—a particular brick cost $33 at any time, rather than $38, constituted a change in the plans and specifications? A. I would not say that. You may buy the same brick today for $33 that you could have bought two months ago for $30 or $36; but brick at the same time and on the same date that cost $33 is not the same brick that you have to pay $38 for. 597

Q. When you advised The Prudence Company that brick costing $33 per thousand was used in-

598 stead of $38 per thousand brick specified in the masonry specification, what conclusion did you want them to draw? A. I am sorry I can not answer for them, what conclusion they should draw.

Q. You had a reason for giving them the information, did you not? A. Naturally. They paid for it. They asked me to make a survey. That was my reason for giving all the information that I had.

Q. Did you claim, then, to them that there was a breach of the specification because the Central Park Properties paid $33 per thousand for brick
599 instead of $38 per thousand? A. Yes. To my knowledge at that time I have gone over the specification, and I found that the specification called for a $38 brick per thousand; and the information that I have got, as I stated before, from my assistant, that the brick was paid for at $33 a thousand, and in order to make sure, I called up before I have written this report—I called up a Mr. Gibson, who sold the brick, and he told me that that brick cost $33, and I based my report on that.

Q. Do you claim that under this specification that the Lefcourt organization had to pay $33 per
600 thousand for brick? A. No, sir, no more than they had to pay $50,000 for hardware. They could select any amount. They could select brick at $20, as far as I was concerned.

Q. So far as you were concerned? A. Yes; if the owner wanted to buy a cheaper brick, that was within his prerogative. It was my place to tell him that the brick was not as good, but if he wanted to use it, it was within his province.

Q. My question was not as to your concern, but as to whether, if they did not pay $38 per thousand for brick, there was a breach of the specification? A. No, I would not say that. 601

Q. Then, would you say that there would not be a breach of the specification? A. That is right; but they would be entitled to a credit—

Q. (Interposing.) No. A. No, there was no breach of the specification. I will put it that way.

The Court: It was all common brick, I suppose?

The Witness: No, sir.

The Court: Face brick?

The Witness: Yes, face brick. 602

The Court: Is there anything in the specification about the quality of the brick or the kind of brick?

The Witness: No. We generally specify so much per thousand.

The Court: And that means brick of a certain quality?

The Witness: Yes, brick of a certain quality—either more porous or denser brick.

Q. And the brick that might have cost $38 a thousand at the time this specification was prepared, one year later might cost $33 per thousand? A. More or less, yes. 603

Q. So that the mere fact that $33 per thousand was paid for brick instead of $38, of itself, would not constitute a breach of the specifications? A. No, sir.

Q. Before you advised The Prudence Company as to this claimed discrepancy in the cost of brick, did you find out or did you know whether the brick

604 actually installed, after having been bought for $33 a thousand, was first quality brick? A. Why, I went to the job just as the brick was unloaded, and I could see that the majority of the brick was not first quality.

Q. So that when you examined the building you saw that the brick was not first quality? A. A large majority was spalled. The brick was spalled, and I immediately—it was chipped on the corners, which turns it into a second quality brick, and I immediately notified Mr. Haas to that effect; and I believe he had a couple of loads shipped back or changed.

605 Q. The defect was in what respect? Would you say because it was chipped? A. Yes, most of the bricks were chipped.

Q. But the inherent quality of the brick was all right, is that right? A. It was not as dense a brick as I intended that it would be for that price. It was more of a porous brick.

Q. Did you see samples of the brick? A. Yes, I saw them.

Q. Which was purchased? A. Yes.

Q. Which the Prudence Company approved? A. I don't know what the Prudence Company ap-

606 proved.

Q. Well, did you see samples? A. Yes, I saw many a sample.

Q. Did you see the particular samples which were bought for this building? A. I did.

Q. And you now say, do you, that the brick which was bought was not the brick which you had in contemplation when you drew the specifications? A. I did not say anything of the kind, no. I just said that the sample I saw was not chipped,

and was all right; but the majority of the brick 607
that were brought to the job were chipped, and that is why I called them "second quality".

Q. But the brick which was brought to the job conformed with the sample, except in the case of chipping? A. Yes, it did.

Q. Then, the brick that was brought to the job inherently was the same brick? A. Yes.

Q. (Continuing.) As was purchased from the sample? A. That is right.

Q. Do you know whether or not there had been a decline in the price of brick from the time that the specification was drawn until the time the brick was purchased? A. I could not remember. 608
Prices were fluctuating at that time. I don't know whether the market was just up or down then. I wouldn't say.

Q. And I understand you to say that the mere fact that brick cost $33 a thousand instead of some arbitrary figure of $38 a thousand in the specifications, does not constitute a breach of the specification? A. It does not. I might add that that would be to a greater extent, if you wanted to use a brick, say, for $20 instead of $38, in that the building would be damaged to a great extent, of course, regardless of whether the contractor gave 609
the owner an allowance or not.

Q. I think we all agree on that, Mr. Grad. A. I just wanted to make myself clear on that point.

Q. When $38 a thousand is specified at a particular time, and a particular type of brick is in mind, if you can buy that brick later on for a better price, that is all right? A. Perfectly all right.

610 Q. And if you have to pay more for it later on, that is all right too? A. Provided it is not a marked difference or to a very marked degree.

The Court: The reference here is wholly to quality, and not the price.

Q. Now, would your answer be the same, Mr. Grad, so far as apartment refrigerators are concerned, where a price or an allowance of $70,000 is mentioned in the specifications? A. Hardly. I do not think the same thing would apply, no, because if you bought a cheaper product—a cheaper brick, and the brick is porous, your walls will leak
611 forever after. On the other hand, if you buy—if you have, say, 700 apartments, and if you buy a cheaper refrigerator, and it does not work, you keep on throwing them out gradually, and replacing them with a better grade of refrigerator, so I do not think you can hardly compare one with the other.

Q. But it is still possible, is it not, that when in May, 1929, a cash allowance is stated to the contractor who was going to bid, of $70,000 for apartment refrigerators installed, that the refrigerators might be obtained for a considerably lesser
612 amount? A. Yes, sir.

Q. By the time it came to install them? A. That is right.

Q. And that the quality of the refrigerator might not be in the slightest affected? A. That is true.

Q. Now, as matter of fact, when these specifications were drawn it was contemplated that there would be a general contractor for the job, is not that so? A. Yes, sir.

Q. Is not that so, Mr. Grad? A. Yes, that is correct. 613

Q. And that, as matter of fact, when the Lefcourt organization took it over, there was no general contractor? A. No, sir; Mr. Lefcourt became the general contractor.

Q. It did the work itself? A. That is right.

Q. And in the event of the letting of a contract to a general contractor upon these specifications, after the close of the work, there would have to be some sort of settlement between the owner and the general contractor? A. That is correct.

Q. As to these items? A. That is correct.

Q. And is not that the only purpose—the only reason that these cash allowances were put in here? A. That is right. 614

Q. Now, taking the matter of the fireplace mantels, Mr. Grad, these fireplace mantels appeared on the original plans? There was a place indicated for their installation? A. Yes, sir.

Q. And under this same preliminary and miscellaneous work specification, paragraph 16, cash allowances, it is provided that the general contractor shall include in his estimate the following cash allowances for fireplaces, 18th to 38th floors, $150 each? A. Yes. 615

Q. And then for the next two floors, $250 each? A. Yes.

Q. I now ask you to look at Item 6 of that document (handing witness).

Mr. Schenck: What is that, Mr. Murray?

Q. Will you read what that says? A. Yes. "Wood floors in private dining rooms omitted, and finished cement floors installed instead."

616 Q. When did you look at the building—when did you examine the building for The Prudence Company? A. I examined the building between the 1st of June and the 1st of July.

The Court: Of what year?

The Witness: 1931. The last week of May, perhaps.

Q. How many private dining rooms are there? A. There are none now in the building; as I recall there were some changes made afterwards; but there were three designed originally.

Q. There are no dining rooms now? A. My
617 recollection is that there are not. I have not been in the building for about a year or so. They eliminated those.

Q. When you were there in June did you see that the wood flooring was absent from these private dining rooms? A. Yes, sir.

Q. Was there anything to indicate that there had been originally wood flooring on there, and that it had been removed? A. All I saw was cement floor. If it had been there and removed, there were no marks of identification of it, that I could see.

618 Mr. Murray: Now, I do not know how far to go on this question as to the flooring in the dining rooms; but Mr. Billsborrow's report states that there were wood floors in these private dining rooms in December, 1930, and—

The Witness: There were several—

Mr. Murray (Continuing): —and I wonder whether, under the circumstances, you are still going to claim, Mr. Schenck, that

there was no flooring there? The only thing that Mr. Billsborrow stated was that they still needed to be scraped and finished. 619

The Witness: There might have been a question as to some other dining room. There were so many dining rooms, that perhaps he called it "private". There was really a palm room and a breakfast room. There was a main dining room floor.

Mr. Schenck: We will possibly be able to clear up any ambiguity in that respect. Certainly, if wood floors were there, we are not going to claim any item of damage for them.

620

Q. Well, tell me again, Mr. Grad—you said something about different dining rooms. You say there were three private dining rooms, and there was a main dining room? A. Yes.

Q. Were the three small dining rooms at one end of the building—at a different end of the building from the main dining room? A. Yes, just directly on the opposite side.

Q. And on what street side was the main dining room? A. The main dining room was toward Sixth Avenue.

Q. That was toward the west? A. Toward the west, yes.

621

Q. And the small dining rooms were toward the east? A. That is right.

Q. And you say that the small dining rooms are not now there? Did you say that? A. Yes, sir. I have subsequently prepared a plan for Bing & Bing, and removed all these dining rooms, and put a kitchen there. They took the kitchen off the ground floor, from the basement, on to the main floor, and by reason of that, removed those private dining rooms.

622 Q. In addition to these three private dining rooms and the main dining room—those are all the dining rooms that there were on the main floor, is not that right? A. No, sir, there was another dining room—there were two more of these on the front of the building, and one of them which they called a palm room, and one a tea room; but they were all classified as "dining rooms".

Q. Now, was the palm room a small room or otherwise? A. It was a larger room. The private dining rooms were very small rooms—just the size of a good sized bedroom or perhaps a dining room in an ordinary home.

623 Q. And how large was the tea room? A. That was quite a size. The tea room was almost as large as this room here.

Q. Did you look at the main dining room when you made your visit in June? A. Yes, sir.

Q. In paragraph 5 you state that the floor needed to be scraped and finished? A. That is right.

Q. Was there anything to indicate, from your examination, whether the floor had ever been scraped or finished? A. It did not look that way. It was very rough. If it was scraped, the job was done so poorly that it really needed new scraping.

624 Q. Is it not possible that it might have been once scraped and finished? A. Yes.

Q. And in the interim that it had been tracked over so much that scraping and finishing was required again? A. Yes, that is likely to happen.

Q. Would you make the same answer as to the dance floor in the main dining room? A. I thought that was the floor you were referring to. The ballroom really is the main dining room. Sometimes they called it the ballroom.

Q. Yes, I made a mistake. In paragraph 5 I saw "Main dining room", and that meant the musicians' platform in the main dining room? A. Yes. 625

Q. And the one now that we are speaking about is what you had originally thought I meant? A. Yes, that is right.

Q. Look, now, at 9, Mr. Grad, and tell me what you mean by "chair rails" (handing witness)? A. A chair rail is a rail that comes within the height of a chair; just to strike the top of a chair —molded wood, generally about four inches wide; varying anywhere from three and a half to four and a half inches. 626

Q. Is it attached to the wall? A. Yes, fastened to the wall.

Q. Against which chairs might rub, is that right? A. Yes, instead of damaging the plaster.

Q. Do you remember, Mr. Grad, any conference at which the question of the omission of radiators from interior bathrooms was considered? A. Yes. sir, very much so. There was quite a discussion about those.

Q. And there were at least seven or eight people present? A. That is right.

Q. At those discussions? A. Yes, at various times. 627

Q. And some people were of the opinion that it was unwise to put radiators in interior bathrooms?. A. Yes.

Q. And some people thought it was advisable? A. That is right.

Q. Do you remember that reports were made as to whether this, that or the other apartment hotel had radiators in the interior bathrooms? A. That is right.

628 Q. And that certain ones mentioned did not have radiators? A. Yes.

Q. And that certain others mentioned did? A. Yes.

Q. And the specifications—the heating specifications, when finally drawn, for the heating and steam fitting contractor— A. Redrawn, you mean?

Q. Yes, drawn and redrawn—they were drawn and redrawn a number of times, were they not? A. I just wanted to be clear on it. When the plans were first drawn, the radiators were shown located in the bathrooms; but when it was finally
629 decided by the Syndicate Subscription Corporation to eliminate the radiators, and among other various changes that were made in these plans, the radiators were eliminated entirely from the bathrooms—

Q. You said "Syndicate Subscription Corporation"? A. Yes.

Q. Well, did you mean "Syndicate Subscription Corporation"? A. No, I meant the Central Park Properties. That is right.

Q. Now, at the time the loan was made there were not heating specifications drawn? A. Oh, yes, there were. Very much so.

630 Q. Are they in here? A. They are in the court room somewhere. If they are not in here, they are separated as I stated before for the various mechanics, but they were a part of the specifications submitted to The Prudence Company. I brought them up there myself.

Q. These are the— A. General specifications.

Q. The general specifications? A. Yes.

Q. Which have been offered in evidence as the specifications upon which the loan was granted?

A. I am sorry I cannot answer for what was offered in evidence, and what was not, but the specifications were in existence. 631

Q. Were you there at the time the arrangement of the loan was completed by the Central Park Properties? A. I was not there, no.

Q. In this particular specification there are no heating specifications? A. Oh, yes, there were. They were attached, but it was a separate addendum—mechanical specifications, blue-printed.

Q. Look at Plaintiff's Exhibit No. 4 and say whether there are any heating specifications there (handing witness)? A. No, there are none in there. 632

Q. Later on, after the Central Park Properties obtained the loan, and the specifications were rewritten, it was first decided to put the radiators in, was it not? A. Well, there were a lot of discussions pro and con on that. Mr. Lefcourt and Mr. Haas had three or four of their own men there—engineers—and as I recall, he sent them out to make inquiries at different hotels; and some of them brought back a report that there were radiators in the bathrooms, and others that there were not; and after they finally decided to eliminate them— 633

Q. (Interposing.) And ultimately an addendum was written to the heating specifications providing for the omission of radiators in the interior bathrooms? A. My recollection is that there was no addenda written. They were just eradicated from the original tracings; just erased from the tracings.

Q. I show you now the specification for heating and ventilating, which is marked Defendants' Exhibit G for Identification, Mr. Grad, and ask you

634 whether that is not the specification which the contract ultimately proceeded under (handing witness)? A. Well, I would not be able to testify to that very well.

Q. Would you not recognize it? A. I would recognize it as a copy, perhaps, but this job was given out directly from Mr. Lefcourt to the engineer, Mr. Kingsley, and their dealings were separate and aside from my own.

Q. You would still have something to do with the preparation of the specifications? A. No.

Q. No? A. The specifications were also prepared by Mr. Kingsley, the mechanical engineer.

635 Q. Would any of the mechanical specifications be prepared by you? A. No, sir. They would just send a copy to my office, to sort of coordinate the work in conjunction with the structural work.

Q. Then, is it so that in all of the mechanical matters that you would not draw the specifications? A. No, sir; those are drawn by the mechanical engineer, and just checked in my office for comparison or interference with other work.

Q. Mr. Grad, when was it that you first went on the job for The Prudence Company in the Spring of 1931 to make a report for the company? A. I

636 believe it was the last week in April or around the 1st of May.

Q. How long did you take to examine the building? A. Oh, about six or seven weeks.

Q. Did that mean you were there each day? A. No.

Q. Every day? A. No, sir.

Q. Do you know how many days you were there? A. Oh, I must have been there at least a dozen times, myself. Then I had two other men check up during intervals. One man might have

been there every day or every other day, and sometimes another man went on. 637

Q. Have you any record to show just how much time was spent on the job? A. I have them somewheres. They must be filed away. It is three years now.

Q. At any time after you left the Lefcourt organization, or rather at any time after June, 1930, when you say your connection with this job ceased, and prior to December, 1930, did you have any talk with Mr. Waterman of The Prudence Company? A. Yes, I believe I had.

Q. And what was the nature of the talk that you had with him? A. I just told him that I was 638 —I was to see him about another loan, to start with, and I told him that I had severed connections with the job and if anything goes wrong not to hold it against me because I am through.

Q. And didn't you tell him at that time about certain things which in your opinion were not in accordance with the plans and specifications?

Mr. Schenck: I object to this on the ground that it is irrelevant and not proper cross examination.

The Court: What is the pertinency of it?

Mr. Murray: Well, if Mr. Waterman, the 639 president of The Prudence Company, knew at that time, your Honor, of changes in the plans and specifications and these changes were satisfactory to The Prudence Company, I do not see how they could claim now against this surety company.

Mr. Schenck: By the form of our agreement we had attempted, at any rate, to exclude any such matters. A specific clause in

640 the bond states there would be no waivers except in writing.

The Court: I sustain the objection.

Mr. Murray: I might say, on that question of waiver, your Honor, that even though there is a specific provision in the contract that none of its provisions may be waived except in writing, that very provision may be waived.

The Court: No.

Mr. Schenck: But this was in the bond.

The Court: I will sustain the objection.

Mr. Murray: Exception.

641 *Redirect examination by Mr. Schenck.*

Q. Just one or two questions, Mr. Grad. You have stated that you delivered the specifications to The Prudence Company before this loan was made? A. Yes, sir.

Q. I show you Plaintiff's Exhibit No. 4 and ask you if that is a part of the specifications which you delivered to The Prudence Company (handing witness)? A. Yes, sir.

Q. I show you these five folders of specifications, four of which are blue prints and the fifth having a brown cover, and ask if at the same time

642 you delivered Plaintiff's Exhibit No. 4 you delivered those five additional specifications to The Prudence Company (handing witness)?

Mr. Murray: I object to the question as immaterial and irrelevant.

The Court: I take it these are the mechanical specifications concerning which you cross examined the witness, and in consequence I overrule the objection.

Mr. Murray: They have offered in evi- 643
dence, your Honor, certain specifications as the specifications upon which the loan was granted. Now they are having Mr. Grad testify that at some time previous to the granting of this loan he had submitted to The Prudence Company certain additional specifications.

The Court: It having been brought out in cross examination, I shall permit the introduction of these exhibits. Not because there was a change in the agreement between the parties, or the terms of your bond, but merely 644
to explain what the witness referred to in answers given on cross examination.

Mr. Murray: It is perfectly satisfactory to me, if it is understood that the mere answer of Mr. Grad now will not be construed to mean that these were part of the specifications upon which the loan was granted.

The Court: I do not know whether it was or not. The question merely goes to the delivery of these specifications to somebody, some officer of The Prudence Company, at the time that Plaintiff's Exhibit No. 4 was delivered. 645

A. Yes, sir; I delivered these specifications at the same time with the specifications for the general construction.

Mr. Schenck: I offer them in evidence.

(Marked Plaintiff's Exhibits Nos. 98, 99, 100, 101 and 102.)

Q. Mr. Grad, these specifications, Plaintiff's Exhibits Nos. 98, 99, 100, 101 and 102 are equally

646 with Plaintiff's Exhibit No. 4 specifications prepared by Frank Grad, Architect, of No. 521 Fifth Avenue? A. No, these specifications were prepared by my engineer, Mr. Kingsley.

Q. But he was in your organization? A. No, he was just employed by me as a mechanical engineer having a separate organization.

Q. Yes, but they were prepared— A. Through me.

Q. Through you. And just in that connection, Plaintiff's Exhibit No. 4 was prepared by a particular specification man employed by you? A. Always. All specifications are.

647 Q. Some suggestion has been made by the other side that these specifications are not sufficient to erect a building completely. What can you tell us in regard to the experience and qualifications of that specification man employed by you? A. Well, the specification writer who has written this specification in detail after my giving him instructions as to the general character, has been prepared by a man who has been in the employ of Mr. John Russell Pope as a special specification writer, and Mr. John Russell Pope has constructed, designed and supervised buildings all over the country,

648 some of the finest, here and abroad.

Q. How long had he been in Mr. Pope's employ? A. Nine years before he came to me.

Q. How long was he in your employ? A. Five years.

Q. Mr. Grad, you have been cross examined in regard to this item of brick which was placed by you in your report as an item on which The Prudence Company might claim a variance between the specifications and the work. As I understand

it, it was some attack upon your fairness. Did you at the time you included that brick claim in your report fairly and honestly believe that a claim against the bonding company was justified on that item? A. Absolutely no. 649

Q. Do you at the present time fairly and honestly believe that a claim against the bonding company is justified on that item? A. Well, I do not know whether it is against the bonding company. I know it is against somebody. The building has suffered. It is not up to me, I don't think, to decide whether it is against the bonding company.

Q. You believe there is a claim, regardless of whom it is to be directed against? A. Yes, sir; positively so. 650

Q. Will you tell us why? A. Well, in the first place because I thought by using a cheaper brick the brick might be somewhat of an inferior quality, on account of being porous, and there was danger of it being a second, and as a result, and proof that my assumption was correct, I have been on the job only two weeks ago and I have found the assistant manager who took me up to the tower floors where we could go out on the terraces, and he has bitterly complained—

The Court: No. 651

Q. No, we will not have anything except your own observation. A. I see. Well, my observation—

Q. In the first place, you saw the samples that had been approved by The Prudence Company in respect of this brick? A. Yes, sir.

Q. Were those samples chipped? A. No, sir; they were perfect.

652 Q. Were those samples cracked on their surface? A. They were not.

Q. You saw this brick that was delivered at the job? A. I did.

Q. Was that brick chipped and cracked? A. A very large percentage of it.

Q. What is the location of this building so far as exposure to weather is concerned? A. Well, the main facade faces north.

Q. And immediately to the north is the exposure of Central Park? A. That is right.

Q. How tall is the building, approximately, so far as its tower is concerned? A. Forty stories.

653 Q. Did you anticipate when you drew the specifications that a brick of the quality indicated by $38 per thousand was necessitated because of the exposed position? A. Yes.

Q. Particularly in respect of the tower? A. That is right.

Q. Did you think that brick of this quality actually delivered, particularly when placed upon the tower of this building, would result in leakage because of the driving pressure of the rain against it? A. I did.

Q. Have you on subsequent investigation found that that brick has had to be waterproofed a num-

654 ber of times? A. Yes, sir.

Q. And in a number of locations? And I am not referring to repointing, but the surface of the brick itself. A. Yes, I found that the entire surface of the tower floors, especially on the side that I could observe from the balconies or from the terraces, has been surfaced with a waterproofing, just due to the fact of these chips and spalls having absorbed moisture.

Q. From all the facts that you have ascertained in regard to this brick at the present time do you believe that that brick is inferior to the brick intended by your specification? A. Yes, sir. 655

Q. Some suggestion was made on your cross examination that there might have been substitutions of more valuable materials and therefore a general improvement over and above your specifications. I call your attention particularly to the item of terra cotta, and show you a letter of Central Park Properties addressed to you, of the 15th of November, 1929, and ask if you received that letter (handing witness)? A. Yes, sir.

Mr. Schenck: I offer it in evidence. 656

(Marked Plaintiff's Exhibit No. 103.)

Q. Mr. Grad, in this letter Mr. Haas refers to a cutting down of some 25 to 30 per cent. of the amount of terra cotta. Had you previously had conferences and discussions with Mr. Haas in regard to that subject? A. I did.

Q. And had you under his direction prepared plans in which the amount of terra cotta used was cut down? A. Yes, sir.

Q. Some 30 per cent? A. Yes, sir.

Q. After this were there further discussions in which the amount of terra cotta was further cut down, or does this period of time mark the final condition of the terra cotta on the building? A. It was not cut down any more than this. 657

Q. So that the terra cotta was cut down in amount approximately 30 per cent? A. Yes, sir.

Q. What was the use of terra cotta on this building? Was it used on the facade of the building? A. Yes, sir, only.

658 Q. For what is terra cotta used, and what is it? A. Terra cotta is a clay baked and glazed.

Q. Is it a decorative feature? A. A decorative feature, instead of stone.

Q. This property facing Central Park, this building facing Central Park, is a building that can be seen from a distance, so that the decorative feature of it is an important feature of the building? A. Yes.

Mr. Murray: I object to it as leading.

The Court: Yes. You have been leading him right along.

659 Q. To your mind did the cutting down of that terra cotta affect the building? A. Well, insofar as looks and design, it did to a great extent.

Q. What was approximately the saving in dollars? He refers here to your receiving bids and negotiating in regard to the terra cotta. Speaking approximately, what was the saving in dollars by the reduction of the amount of terra cotta by 30 per cent? A. Well, I do not believe I have ever seen any terra cotta figures on the job, and I could not really say what the saving was; but I know there was 30 per cent. of the terra cotta saving, as Mr. Haas states here in the letter himself.

660 Q. I might in that connection ask you if this is a photograph of the building from the Central Park, and does that show something of the terra cotta decorations (handing witness)? A. Yes, sir; it does. Very faintly, but—

Mr. Schenck: I offer it in evidence.

(Marked Plaintiff's Exhibit No. 104.)

Mr. Murray: Will your Honor permit me to ask one further question on first cross?

The Court: Oh, yes. 661

Mr. Murray: Which I really had forgotten to ask.

Recross examination by Mr. Murray.

Q. I understood you to say, Mr. Grad, that you had prepared plans and specifications for some changes in the lower floor of this building for The Prudence Company. A. For Bing & Bing.

Q. Will you tell us what these changes were? A. Well, the principal change was taking the kitchen, the main kitchen, from the basement up to the first floor.

662

The Court: He told us about that this morning.

Q. Were there any structural changes in order to accomplish that change, Mr. Grad? A. Very few structural changes. Mechanical mostly.

Q. What other changes were there in addition to the changing of the kitchen from the lower to the upper floor? A. The only additional work I did was design a marquee in front of the building, a canopy at the entrance.

Q. What was the result of changing the kitchen from the lower floor to the ground floor; what was necessary to be done in order to accomplish that? 663
A. We eliminated those private dining rooms we spoke of this morning.

Q. You eliminated the private dining rooms? A. That is right.

Q. What became of the private dining rooms? A. Why, to my knowledge I have not prepared the plans for that. There were some of them shifted to the second floor without my having anything to do with it.

664 Q. Wasn't there a change on the first floor involving the so-called barber shop? A. Not to my knowledge.

Q. Is there a barber shop now on the first floor? A. I believe there is, but I would not be sure about it. I have not been on 58th Street in a couple of years now.

Q. How many plans did you draw for those changes? A. Just one plan.

Q. Did you supervise the work? A. I did not supervise the work. I just turned it over to Mr. Lukach.

Q. Do you know who the masonry contractor
665 on this job was? A. I knew the name of him, but I cannot recall. I only met the gentleman about two or three times during the course of construction, the contractor himself. McNally, I believe, it was, if I am not mistaken.

Q. Had you ever met McNally before in construction work? A. No, the first time I met him was through Mr. Haas.

Q. This is the first job which you ever had in New York, is it not? A. That is right, and the only job.

Q. So that at that time you were not able to state or you had no knowledge whether or not
666 McNally was a first-class masonry contractor? A. I knew that McNally ranked as a very good contractor.

Q. Did you know, although you had never met him on any other job, that he had completed some of the largest buildings here in New York City? A. Yes, sir.

ARTHUR S. LUKACH, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows: 667

Direct examination by Mr. Judd.

Q. Have you given your full name and address to the reporter? A. I have.

Q. Tell us what your occupation is? A. I am a civil engineer.

Q. Can you give us briefly your experience and training as a civil engineer? A. I am a graduate civil engineer; I am licensed in the State of New York as a practicing engineer, and I have had fifteen years' experience in the building construction 668 industry.

Q. A graduate of what school? A. New York University.

Q. What sort of buildings had your construction experience involved? A. It has involved practically every type of building: apartment houses, hotels, loft buildings, and a theatre.

Q. Can you tell us a few of the apartment houses and hotels the construction of which you have had to do with in your capacity as a civil engineer? A. The Berkshire Hotel, 52nd Street and Madison Avenue; apartment houses at 1175 Park Avenue, 139 East 94th Street; the Keith-669 Albee Theatre, New Rochelle; the Heckscher Building, an office building at 57th Street and Fifth Avenue; the Textile Building, 295 Fifth Avenue; the DePinna Building, 52nd Street and Fifth Avenue; and a number of others.

Q. What is your present occupation? A. I am employed by Bing & Bing.

Q. And how long have you been with them? A. A little over four years.

670 Q. And before that what was the nature of your work? A. Before that I was employed by George Backer, Inc., in charge of their building construction.

Q. And what was the nature of your duties in connection with building construction? A. I awarded the contracts, took estimates, prepared the specifications, and supervised the construction.

Q. You were in general charge of the work? A. I was.

Q. You are familiar with the reading of plans and specifications? A. I am.

Q. Are you familiar with the completion of
671 building construction work? A. I am.

Q. Can you tell us what problems are involved in the completion of a building, which differ in any way from those involved in straight construction work?

Mr. Murray: That is objected to as immaterial and irrelevant.

The Court: Overruled.

Mr. Murray: Exception.

A. In general, the completion of a building is a much more difficult task, and takes a longer time. When the steel and excavation and masonry take
672 place, it goes comparatively quickly, but the completion of an unfinished building, because of the details of construction, takes time.

Q. Is there any greater expense or greater labor involved in completing a building after work has been abandoned than the completion of it while the work is going along in the regular course? A. I should say yes.

Q. In what way? A. It is necessary for the new contractors to pick up the threads where the

old ones left off, and time is spent in getting the job organized; whereas, if they had already started on it from the beginning, they could go through quickly and more expeditiously. 673

Q. Can you tell us how the size of Essex House compared with other apartment hotels on which you had worked? A. It was the largest one.

Q. And how did it compare with other apartment hotels in New York? A. To the best of my knowledge, I think it is the largest apartment hotel in New York.

Q. When was your first connection with Essex House? A. My first connection with Essex House was in March of 1931. 674

Q. And will you tell us what you were instructed to do in relation to it, and how your connection with it came about? A. I was called into the office—one of the offices of Bing & Bing toward the end of March, 1931, and was told that I was to go up to the Essex House in the capacity of what they called a project manager, and to do two things: first, to make a survey of the building; and, secondly, to complete it.

Q. Were you at that time given the plans and specifications on which the building had to be built? A. I was.

Q. I show you now Plaintiff's Exhibits Nos. 4, 98 to 102, also Plaintiff's Exhibit No. 5, and ask you if those are the plans and specifications which were given to you at that time (handing papers to the witness)? A. They are. 675

Q. Those are the plans (indicating)? A. These are the plans, yes.

Q. And did you examine those plans and specifications? A. I did.

676 Q. About how much time did you spend in studying them? A. A number of days.

Q. Did you examine the building to determine the extent to which it had been completed in accordance with the plans and specifications? A. I did.

Q. Will you describe for us the manner in which your examination of the building was conducted? A. When I first went to the building I engaged an assistant, and we started to make a very minute inspection of all the rooms and spaces in the building. We recorded our observations in a number of note-books, and on loose sheets of
677 paper, and they were tabulated, first as to the rooms, and secondly, after that, as to the trades involved.

Q. Are these the note-books in which your observations were recorded (exhibiting)? A. They are.

Mr. Judd: I ask that they be marked for Identification.

(Books marked collectively Plaintiff's Exhibit No 105, for Identification.)

Q. Approximately how long a time—

678 Mr. Judd: That is four note-books and two folders of loose pages.

Q. Approximately how long a time, Mr. Lukach, was spent by you in your study of the building? A. I should say between four and five weeks.

Q. And how great a portion of that time did you spend at that during those four or five weeks—yourself and your assistant? A. We spent altogether between four and five weeks, as I remember.

Q. How many rooms are there in this building? 679
A. I think, 1187; and then there are maids' rooms and additional dining rooms and so forth.

Q. Did you visit every room? A. I personally did not, but my assistant did.

Q. About how many trades or specific subdivisions of the specifications and plans were to be considered? A. I should say there might be between 15 and 20 trades.

Q. And did you examine each room to determine the extent of compliance with the specifications and plans as to each of those individual trades? A. Each room was examined.

Q. Were you given, at the time you entered the 680
building, any information as to the extent to which it complied with the plans and specifications? A. Will you repeat that question?

Q. I say, at the time you entered the building were you given any information with respect to the extent to which it complied with the plans and specifications—the extent to which it had been completed in accordance with the plans and specification? A. No, I was not.

Q. I show you now Plaintiff's Exhibit No. 64, for Identification—a report from Mr. Billsborrow to Mr. Braislin, dated February 20, 1931, and ask you if you have seen that before (handing wit- 681
ness)? A. I have.

Q. Did you have that at the time that you examined the building? A. I did.

Q. Did anyone besides your assistant and yourself examine the building in relation to the extent of completion? A. Yes.

Q. Can you tell us who that was? A. Mr. Grad, and then later on a representative of the bonding company.

682 Q. Did you know at the time that you entered the building that a bonding company was interested in the matter? A. Interested in the inspection or just general interest in the building?

Q. Interest in completion of the building. A. No, I did not.

Q. When did you first learn about the fact that a bonding company had guaranteed the completion of the building? A. When I was told to take charge.

Q. I show you now Plaintiff's Exhibit No. 66, and ask you if you knew of the sending of that letter (handing witness)? A. I did.

683 Q. The date of that letter is March 31. When did your inspection of the building begin? A. The beginning of April.

Q. And did any representative of the surety company join you in that inspection? A. They did not.

Q. When was the first that you heard from any representative of the surety company? A. About six weeks after I started the inspection.

Q. Can you give us the exact date? A. I think it was in the latter part of May. I can not give the exact date.

684 Q. I show you now a letter dated or a copy of a letter dated May 27, from the 5859 Realty Corporation, signed by yourself, to Keeler, Inc., and ask you whether that refreshes your recollection as to the date when the surety company's representative first appeared (handing witness)? A. Yes. I should say it was a few days before the date of this letter that I first saw their representative.

Q. And who came from the surety company? A. A Mr. Clark and a Mr. White.

Q. And who were they? A. As I recall, Mr. 685
White said he was an attorney connected with the Fidelity & Deposit Company; and Mr. Clark said he was also connected with them. I do not know what his position was.

Q. Did you have any conversation with them? A. Yes, general conversation.

Q. Can you tell us generally the subject of it? A. I told them that we were starting an inspection of the building, and that I was up there to complete the building. The rest was mere generalities, I think.

Q. Did you give them any information as to the extent of completion or as to the plans and 686
specifications governing the completion? A. Yes, I sent them a complete set of plans and specifications. That is mentioned in that letter.

Mr. Judd: I offer that letter in evidence (handing paper to Mr. Murray).

(Marked Plaintiff's Exhibit No. 106.)

Q. Were those plans and specifications sent to Mr. Switzer, at his request? A. Yes.

Q. Did he give any reason why he required a new set of plans and specifications? A. Yes, he said he had none. 687

Q. He was a representative of the surety company? A. He was employed by Keeler, Inc., who represented the surety company.

Q. After you gave Mr. Switzer the plans and specifications, did he come to the building again? A. Yes.

Q. And can you tell us what he did there? A. He started to make—to go through the building and see the condition.

688 Q. And you permitted him to examine the building, did you? A. Yes.

Q. Did you place any restrictions upon his opportunity to inspect the building? A. No. Quite to the contrary. As a matter of fact, I offered him the services of my assistant, and I remember that they did go through together.

Q. Who was your assistant? A. Mr. O'Brien.

Q. About how much time did Mr. Switzer spend in his examination of the building? A. As I recall, about in the neighborhood of a total of five days, I should say.

Q. That is, five days from nine o'clock a. m. to
689 five o'clock p. m.? A. No; that was the total time spent altogether. It may not have been a full day at certain time.

Q. And his inspection, you tell us, began some six weeks or more after your survey had begun? A. That is corect.

Q. Was your survey complete at that time? A. Yes.

Q. And had you begun to correct any of the items of omission? A. We had.

Q. Or incompletion? A. Yes, we had.

Q. Had any work been done in completion before Mr. Switzer came to the building? A.
690 Yes.

Q. Did you discuss with Mr. Switzer at all the extent of incompletion or of variations from the plans and specifications? A. Yes, I did, in general.

Q. I show you now Plaintiff's Exhibits Nos. 71 and 72 (handing witness), and ask you if you have seen the lists annexed to those letters before? A. Yes, I prepared those lists.

Q. And you made the estimates as to value or cost on various items included in those lists? A. Yes. 691

Q. Did you discuss those lists with Mr. Switzer? A. Yes.

Q. Can you tell us about the length of time after your first conversation with him you went over them with him? A. Oh, I think, about the first few days he was there.

Q. I show you now a memorandum dated June 27, 1931, and ask you if that refreshes your recollection as to the time of these discussions (handing witness)? A. Yes. It was the latter part of June. 692

Q. Do you know how much time you spent with Mr. Switzer discussing the lists contained in Plaintiff's Exhibits Nos. 71 and 72? A. It may have been a couple of days, to the best of my recollection.

Q. Did Mr. Switzer question the amount of any of the items? A. No.

Q. Did he question whether any of those items had, in fact, been omitted? A. No.

Q. You may have heard, in Mr. Murray's opening, the statement that some of the items included in Schedule B annexed to the complaint, and some of the items claimed against the surety company in this suit were entirely fictitious. Did Mr. Switzer suggest that any of the incompletions which were referred to in these lists were fictitious? A. No. 693

Q. Or that your lists had not been prepared in accordance with the plans and specifications? A. No, he did not.

Q. Did he offer to complete the job on behalf of the surety company? A. He did not.

694 Q. What did Mr. White tell you when he came there to the building? A. Mr. White told me that all the affairs in connection with this building, of the Fidelity & Deposit Company had been turned over to Keeler, Inc., with which firm Mr. Switzer was associated.

Q. Explain to us, please, the nature of the work which you did in completing this building? Did you let the contracts? A. I did; I let all the contracts, supervised the work, prepared all specifications where necessary and passed on the payments.

Q. Did you prepare a list of the work which was
695 done in completion? A. I did.

Q. Now, there has been some reference to alterations made in the first floor. Did your list include any charge in connection with these alterations? A. It did not.

The Court: That did not include, then, the modification in respect to a change of the kitchen to the first floor?

The Witness: No.

The Court: Or the elimination of partitions in those private dining rooms?

The Witness: No, nothing like that, nor
696 the marquee, nor the wood floor, or anything like that.

Q. I show you now Plaintiff's Exhibit No. 84, and ask you if you prepared that list or if it was prepared under your direction (handing witness)? A. It was.

Q. And the items of expenditure listed on there were actually spent, were they? A. They were.

Q. And the expenditures were made under your direction and supervision? A. They were.

Q. And are the amounts there shown the reasonable cost of the items listed in those schedules? 697
A. They are.

Q. Have you examined Schedule A annexed to the complaint? A. I have.

Q. Was that also prepared under your direction? A. It was.

Q. Are you familiar with the differences between Schedule A annexed to the complaint, and Plaintiff's Exhibit No. 84? A. Yes.

Q. Did you have the checks and vouchers covering each item before you when you prepared Schedule A? A. I did not.

Q. Can you tell us, in the main, what the differences are between Schedule A and this Exhibit No. 84? 698
A. When I prepared the revised schedule A there were certain additions and certain deductions made from the original schedule, because at that time we discovered certain vouchers and checks that I had not seen before.

Mr. Judd: Your Honor, with a great deal of difficulty, before defendants' counsel this morning stated his position with respect to specific items of Schedule A, we gathered together all the checks and vouchers covering those items. In order to economize time in 699
the trial, I think we can perhaps rest on the witness's statement of his preparation of Schedule A, and not introduce the vouchers, except for items as to which there is a question raised.

The Court: Or as to which the defendants seek an inspection.

Mr. Judd: Yes, they are here for him to examine.

700 Mr. Schenck: Would it be feasible for us to introduce, on the statement of the witness that each and every item upon this schedule is an item of actual competition, made under his supervision, and that the amount of expenditure is the amount stated—to introduce or to have regarded that schedule as prima facie proof of the expenditure of that amount —tendering, however, to our opponents the detailed checks and vouchers and bills in support of any item concerning which they seek to inquire?

The Court: I see no objection to that.

701 Mr. Murray: I think it is perfectly all right for Mr. Lukach to testify that he paid a certain amount of money—

The Court (Interposing): That, in substance, is what he has testified to, and if you, on cross examination or otherwise, seek to check the items in any respect, that is your privilege.

Mr. Schenck: We should have no objection, inasmuch as there is a multitude of detail here, to allowing Mr. Murray to examine into the items before he makes his cross examination, or at any rate to reexamine these

702 vouchers at any time afterward, and to recall the witness.

The Court: Very good.

Mr. Schenck: Then, it is considered that this schedule, in respect of all its items, on the testimony of this witness, constitutes a prima facie case as to the items of completion and the expenditure of the amounts on the schedule?

The Court: We will not say what it constitutes, but you offer it for whatever it is worth. 703

Mr. Schenck: Yes. I am not offering it now, because it has already been marked in evidence. I am merely reoffering it as evidence of the items therein contained.

The Court: But you do not have to reoffer it. It is in as an exhibit, and the witness now testifies or has testified with respect to the correctness of each item of expenditure.

Mr. Schenck: Yes.

Q. Will you take up now, Mr. Lukach, Plaintiff's Exhibit No. 85, headed "Schedule B, Revised" (handing witness)? Was that prepared also under your direction? A. It was. 704

Q. And Schedule B annexed to the complaint was prepared under your direction? A. It was.

Q. Did you, at the time that Schedule B annexed to the complaint was prepared, have before you all the correspondence of the Prudence Company's engineering department bearing upon waivers of any changes from the original plans and specifications? A. No, I did not.

Q. Have you examined the plans and specifications with particular reference to the items listed in Plaintiff's Exhibit No. 85? A. I have. 705

Q. And you have also examined the hotel? A. I have.

Q. And you can state that the items mentioned in Plaintiff's Exhibit No. 85 were not included in the hotel as it was when you entered into it? A. That is correct.

Q. Are you familiar with the amounts which are listed in regard to the cost or value of each item in Schedule B? A. I am.

706 Q. Do those, in your opinion, represent the reasonable cost of supplying the items mentioned, or in cases where that is questioned, the reasonable difference in cost between the materials which were installed and the materials which the plans and specifications called for? A. Yes.

Mr. Judd: We are prepared, partly through Mr. Lukach and partly through other witnesses, to substantiate in detail the reasonable value of the items in Schedule B.

The Court I do not think you will have to go forward with such proof, in the present state of the case. That may be reserved for
707 rebuttal, perhaps, if necessary.

Mr. Judd: Yes.

Mr. Schenck: We should like to reserve the right in that respect, and particularly with regard to the painting item, we are prepared to give substantiating evidence, and also with regard to each of these items, but in the interest of shortening the trial, we should prefer to reserve it for rebuttal, if your Honor will allow that?

The Court All right.

Mr. Judd: In that event, we are through
708 with the direct examination of this witness—oh, one more question.

Q. Have you certain notes there, Mr. Lukach, which you have prepared, in reference to the items in Exhibits Nos. 84 and 85 (exhibiting)? A. I have.

Mr. Judd: I think the witness should be free to use those, in the course of his cross examination.

The Court: He may, if necessary.
Mr. Judd: That is all. 709

Cross examination by Mr. Murray.

Q. Do you see in the court room now a gentleman who saw you at the building, and whom you designated as Mr. White? A. No, I do not see him here.

Q. Are you sure of the name, Mr. Lukach? A. Oh, I am quite sure of the name, yes.

Q. Now, you say you spent about from four to five weeks in the examination of this building; is that correct? A. That is correct.

Q. Does that mean that you spent all of those 710
weeks at the building, the whole of each day? A. I stayed at the building continuously. I had my office there from the first time I went there until I left.

Q. And you stayed there each day all of the day? A. Each day all of the day I was at the building.

Q. Each day you were at the building? A. Yes, that is correct.

Q. And all of each day? A. All of that day, each day.

Q. And your assistant, I understand, reported to you that he examined this, that or the other 711
room? A. That is correct.

Q. If you had not examined it yourself? A. That is correct.

Q. Now, when in March was it that you were first approached as to making an inspection of this work? A. I should say it was the last week in March.

712 Q. And at that time did you arrange to go to the building and take up your office there? A. I did.

Q. And in April did you begin your actual physical inspection? A. As I recall, it was about the first day of April.

Q. Now, just explain in detail what you would do as you entered a room in that building? A. We had a note-book with us, and we had previously refreshed our memories by looking at the plans and specifications. As we went into a room we noted down various items that were either incomplete or that had been damaged—such as
713 where plaster was cracked; whether fixtures or parts of fixtures were missing; whether any hardware was missing; whether any carpentry items had been omitted, such as shelving, clothes poles; whether glass in doors was omitted; whether the base had been broken, and so forth.

Q. And each of those omissions would be—each of those items would be written down by you as you went through your physical inspection? A. By my assistant or myself.

Q. Now, having started your inspection at the beginning of April, would you say that you had
714 completed it early in May? A. That is correct, yes.

Q. When was it that you had completed this schedule, being part of Plaintiff's Exhibit No. 71 (handing witness)? A. That schedule, as it stands now, was completed some time after the inspection was made.

Q. And how long before June 9, would you say that this schedule had been completed? A. Not very much before that time, I should say.

Q. Early in May you had completed your in- 715
spection? A. That is right.

Q. Did you immediately proceed to put it down in writing, for a report to the Prudence Company? A. I started it, but it was a very lengthy operation.

Q. And you changed your idea as respects the form of the report, did you? A. No, I did not change my idea.

Q. You say you started it, but it was a very lengthy proceeding? A. That is correct.

Q. But this is the one you mean, is it (exhibiting)? A. That is the one I mean, yes.

Q. I see. Now, when was it that you had dis- 716
covered the items represented on the schedule, being part of Plaintiff's Exhibit No. 72 (handing witness)? A. I noticed some of these articles as soon as I went to the building.

Q. And did you include those in your original report? A. Some of the items were included at the time we went through on the survey. Others were put down later.

Q. The reason I ask is this, Mr. Lukach: These items are included in a report of July 6; they are included in a letter of July 6, and these items are included in a letter of June 9, one month previously; and you had completed your inspection early 717
in May, 1931? A. That is right.

Q. Now, at the time this letter of June 9 was sent containing these items, had you knowledge of these items also (indicating)? A. I had knowledge of some of them. Others may have been found out later.

Q. Well, can you tell me what items were found out after the sending of the report of June 9 (handing witness)? A. Yes. Some of these items

718 were taken from the report of Mr. Grad. He had certain items on his report that I had not on mine.

Q. Now, you are an engineer, and I understand you made a study of the plans and specifications in order to make a complete inspection? A. That is right.

Q. And from a study of the plans and specifications you could tell whether or not, in the case of metal stools, for instance, the plans and specifications had been complied with? A. Yes.

Q. Did you discover the fact that there were metal stools and aprons on certain windows instead of wooden aprons? A. Yes, I did discover
719 that.

Q. When did you discover that? A. I noticed that quite often as I went into the building.

Q. Did you make a report of it? A. I made a note of it, yes.

Q. But you did not include it in your schedule which was made for the June 9 letter? A. No.

Q. Can you explain why you did not want to put it in that schedule? A. Yes. That schedule was the amount required to complete the building. The other schedule was the deviation from the original plans and specifications.

Q. So that you did not include in this schedule
720 any omissions or substitutions, is that right? A. I would like to recall it again by looking at it, before I say "yes" to that.

Q. (Handing paper to witness.) A. (After examining.) Yes, that is substantially correct.

Q. Well, what sort of report were you asked for, Mr. Lukach? A. I was asked for a report in two ways; the amount necessary to complete the building; and then the amount involved, because of the fact that the building was not erected in accordance with the original plans and specifications.

Q. Did you make a report to the Prudence Company at one time in which you gave both kinds of items? A. No. 721

Q. You did have the omissions and substitutions at your disposal at the time you sent along the first report, did you not? A. I don't know whether those items were complete; whether that list was completed or not at that time.

The Court: But your field work had been completed?

The Witness: Yes, the field work had been completed.

Q. Will you check on this Plaintiff's Exhibit No. 72 those items which you yourself had discovered? A. Do you want me to mark alongside of each one? 722

Q. Yes, write your initials alongside of each item which you discovered. A. (Marking papers and handing same to Mr. Murray.)

Q. Then, any other items than those initialled by you were found by Mr. Grad? A. Yes.

Q. Then, outside of the items of Keene cement, and teak and burled wall panelling, and the brick item, all the others were discovered by you? A. Yes.

Q. I notice here in this exhibit that on the hardware you mention "Hardware allowance, $50,000, Contract Rosenthal Hardware Company, $20,-500." You were then familiar at that time with the contract or the contract price? A. Yes. 723

Q. For the hardware? A. That is correct.

Q. And in the same way you were familiar with the allowance—the cash allowance provided in the original specifications for medicine cabinets, and also the contract price for the cabinets which were actually installed? A. That is correct.

724 Q. And in the same way with respect to the apartment refrigerators? A. That is correct.

Q. You will notice the estimate of Kellastone carpet strips and labor for installing, and the material, being a total of $9,975 (handing witness). Did you subsequently revise that figure? A. You made a slight error there. You said "Kellastone carpet strips and labor for installing". The labor for installing is a different item.

Q. Oh, excuse me. Yes, that is labor for installing molding? A. Yes, that is a different item.

Q. Now, upon what basis or upon what information did you base your estimate as to the value
725 or the cost of installing Kellastone carpet strips? A. By the people who install the Kellastone carpet strips. They gave us an estimate for the work.

Q. And later on did you get another estimate somewhat lower? A. More recently we had Mr. Zilber check up the quantity of Kellastone carpet strips, and his quantity was smaller than the original amount, as I recall it, and in the revised schedule we used the smaller amount.

Q. Now, on the matter of carpentry labor, I notice in here that there is $150.32 which I understand you paid for trim bills? A. That is correct.

Q. And an item in the same paragraph of
726 $985.70 for labor? A. That is right.

Q. Now, was this item of labor in connection with these trim bills? A. Not entirely, no.

Q. The trim bills represented the actual purchase or cost price of the items which were purchased, is that right? A. That is right.

Q. The $150.32? A. Yes.

Q. And did the Lockwood Manufacturing Company, or Bell Brothers, or Hasbrouck have any-

thing to do with the installation of that work? A. No, sir. 727

Q. Now, who is Finkelstein? A. Carpentry contractors.

Q. And for what work did you contract with Finkelstein? A. I had a contract with them to furnish carpenters at so much per day for all carpentry work that was required.

Q. So that you checked on the number of workmen of Finkelstein's who appeared on this job? A. I did.

Q. And this amount of $1,031.67 is the total of the bills charged for their presence at the building, is that right? A. No, it is not. 728

Q. Well, how did you arrive at that $1,031.67? A. The total of the Finkelstein bills was greater than the amount there, because they did other work which was not chargeable to completion.

Q. And what was that work? A. Alteration work which we did in general throughout the building.

Q. How did you allocate to this particular work this sum of $1,031.67? A. We kept a daily record —a daily time book, and marked into it the carpenters who were employed on the completion work. There is one other thing that I want to tell you, that you have in the back of your mind, 729 I think: that in addition to the carpenters putting on the trim, for which the bills are mentioned, they also put on a lot of hardware. Those hardware bills are not in the carpentry item.

Q. That is what I wanted to find out. A. Yes, I thought you had that in mind.

Q. The difference between $152 worth of material— A. (Interposing.) Yes.

730 Q. (Continuing)—and $1,031 of carpentry labor— A. Yes. You will see a substantial hardware bill there.

Q. So that really you did check, in allocating in part Finkelstein's bill to this particular item—you did check the amount of time spent by the carpenters in doing those items which are covered in Schedules A and B? A. That is correct.

Q. What was the total amount of the bill that Finkelstein charged—the total bill charged by Finkelstein for carpentry labor? A. I am not prepared to state that offhand. I haven't got the exact figures, but it was considerably more than
731 that.

Q. Do you know how long these laborers were on the building or at the building? A. Which laborers?

Q. Finkelstein's laborers? A. Yes.

Q. How long were they at the building? A. We had some carpenters up to the time practically when I left—the whole time I was there.

Q. Was there any time in particular when there was a larger number of carpenter laborers there than at any other time? A. Yes.

Q. And what was that period? A. That was the period when we were cutting down the kalamein
732 doors in order to make room for wood floors, which were installed.

Q. Now, Mr. Lukach, I would like to have you describe just what the nature of the alteration, if any, was which was made in the lower floors? A. I have a plan with me, if you would like to see it, of that alteration, or I can tell you in detail: the main kitchen was taken from the basement and put on the ground floor, in the general location where the private dining rooms were

originally shown. In addition to that, the large 733
dining room to the right of the main entrance on 59th Street, was converted into a separate banquet quarters. We had a separate entrance, from the Central Park side, directly in there, and partitioned that off from the rest of the lobby. Another large item was the installation of wood floors in approximately 60 per cent. of the building. Another item was the installation of the marquee over the main entrance; and the last of the other items was the furnishing and installing of gas ranges in all the serving pantries. I think that covers the larger items of alteration.

Q. Serving pantries? A. Yes, they are called 734
"serving pantries"—small rooms connected with each apartment wherein there is a sink, and a little refrigerator and other equipment for some light cooking. They are called "serving pantries".

Q. Was that installation of additional refrigeration? A. No; I said "gas ranges". There were no gas refrigerators.

Q. Oh, I beg your pardon. Was this erected as a non-housekeeping hotel? A. I am quite sure it must have been.

The Court: The law was changed after a 735
while—

The Witness (Interposing.): Yes, I was just going to say that.

The Court: Was there not some state legislation with respect to tenement house violations filed against a number of hotels in New York, preventing cooking in small apartments? I think there was some legislation with respect to those structures.

The Witness: Yes. This was the first hotel able to take advantage of that change.

736 Q. I see. A. And put in gas ranges; and of course we immediately did that.

Q. Now, how long did the doing of this different work which you have described, take, Mr. Lukach? A. Oh, I should say it took approximately four months on and off.

Q. That is, the changing of the kitchen, and the rearrangement or installation of gas ranges in the serving pantries? A. Yes.

Q. As you call them? A. Yes.

Q. Now, may I see the plan to which you referred a second ago? A. Yes, certainly (handing blue print to Mr. Murray).

737 Mr. Murray: I offer this plan in evidence, your Honor.

(Blue print marked Defendants' Exhibit H.)

Q. Now, will you hold that for a moment, this Defendants' Exhibit H (handing witness)? A. Yes.

Q. And I will ask you to refer to it: Now, did this work which is shown on this plan obviate the necessity of putting in any bronze screens at all or certain bronze screens? A. Certain rooms that
738 were shown on the original plan were no longer there.

Q. And do you know where the bronze screens were supposed to have been placed which under Schedule B were omitted from the lobby floor? A. Yes, sir; I know where they were supposed to be.

Q. Is there a place on this plan where these particular bronze screens could be put in?

Mr. Schenck: I think we should object to this, your Honor. It has nothing to do with our case.

The Court: I do not see that it has. If they afterwards when they get possession decide they want to change around their building, that does not mean that the owner is relieved of his obligation under the contract. 739

Mr. Murray: No, your Honor, but on the question of damage if they were going to rearrange the lower floor so that probably the bronze screens, if they had been installed, would be taken out I cannot see where any damage has been sustained.

The Court: No, but the item of damage they would be able to prove though they did not have to do anything to the building. Even though they did nothing to the building they would still be able to prove the damage. 740

Mr. Murray: I wish to state my position, then, at this time, your Honor. So far as the damages for omission are concerned. That is this: They are entitled to recover for omissions which they have not put in only in the event that those omissions have so decreased the value of the building as to lessen the security which the building was supposed to represent, and in the absence of their actually paying money for the insertion of those omissions they have not sustained any damage. 741

The Court: I do not think that follows at all. They might have remodeled the entire structure. They might have in the exercise of their business judgment as owners. Not as mortgagees, but as owners they might have decided it would be a more profitable enterprise to them to remodel the entire structure

742 and use it for another purpose, if that were feasible. That does not bear upon the question of the damages which they as mortgagees sustained. After all, this is a law action, this is not a matter of equity.

Mr. Murray: Exactly, it is a law action, and the material question is what damage has been sustained by the plaintiff. Now I claim that no damage has been sustained if as a matter of fact they have received a building which is as valuable as the building would have been without the omissions, as long as they have not spent any money in going into
743 the building.

The Court: I think that really carries us into the realm of speculation. I shall sustain the objection.

Mr. Murray: Exception.

The Court: You can see how untenable your position is if you reflect for a minute on the matter of expenditure involved in the reconstruction of this basement and upper floor. It involves much more than the omission of these few bronze screens.

Mr. Murray: Oh, yes, it includes more
744 than that, certainly.

The Court: I could conceive that if the object of the reconstruction was to offer some substitution for the bronze screens, you might have an arguable point, although I am not prepared to admit even that. But this was not by way of substitution at all; this was a totally different thing. You cannot argue their damage is obliterated by reason of this tremendous expense they incurred in seeking a wholly different objective.

Discussion

Mr. Murray: Of course, if on the lobby floor on the original plan, your Honor, there had been a provision for bronze screens on either side of the doorway and the bronze screens had not been put in, and then they alter the ground floor so that there was not this doorway which would require bronze screens, I say that they have not sustained any damage at all by reason of the absence of these bronze screens which they would have removed anyway. 745

The Court: No, but what they did afterwards was not done as mortgagee at all. It was done as owner. 746

Mr. Schenck: Quite possibly on Mr. Murray's theory we might be entitled to the cost of these alterations. It might have been the absence of these bronze doors—

The Court: I have pointed out to him that there was a vast expense entailed which as a matter of incident merely and not of design avoided the necessity of the installation of some of these screens. Well, I have ruled in the matter, and I was just talking aloud for the moment.

Mr. Schenck: I offer now the admission in the answer of the defendants which I referred to at the beginning of the trial. 747

I offer in evidence Paragraph 12 of the present answer of the defendants, which alleges as a part of its first separate complete and distinct defense:

"Twelfth: That on the 5th day of December, 1930, the building was in such condition that it would have required a sum in

748 excess of $170,000 to complete the same and make it ready for occupancy, and there were omissions of labor and materials from and substitutions of inferior materials in said building amounting in value to a sum in excess of $230,000."

I also offer in evidence a paragraph of the original amended answer which was stricken out by the Court, and I am offering this solely as an admission. It is the twentieth paragraph of the second separate and distinct defense, which reads as follows:

749 "Twentieth: That on the 5th day of December, 1930, the value of labor and materials still remaining to be installed and incorporated in the construction of the building was in excess of the sum of $400,000."

This answer being verified on the 2nd day of March, 1933, by Andrew G. Schneider, the assistant secretary of the Fidelity and Deposit Company of Maryland. I ask your Honor to consider these admissions in the light of the evidence of the case that the rep-
750 resentatives of the defendants were given full opportunity to—

The Court: Such parts of the answer or amended answer as you have read will be received as exhibits in the case.

Mr. Murray: That brings up a question which I had intended to bring up before that, your Honor, and that was to amend my first separate and complete defense in the answer. May I then make this motion, your Honor.

Discussion

That the first separate, distinct and complete defense be amended to read as follows: 751

"Eleventh: That the building loan agreement entered into between the plaintiff and Central Park Properties, Inc., provided that the building to be erected by Central Park Properties, Inc., should be completed and ready for occupancy no later than December 16, 1930; that the alleged items of incompletion claimed by the plaintiff, totalling a sum approximately $170,000, and the alleged omissions of labor and materials from and substitutions of inferior materials 752 in said building, amounting in value to a sum in excess of $230,000, as alleged by the plaintiff, were known to the plaintiff on the 5th day of December, 1930, and that although the plaintiff had knowledge thereof the plaintiff advanced the Central Park Properties on the said 5th day of December, 1930, all of the monies which it had agreed to advance under said building loan agreement, although the plaintiff knew that the Central Park Properties, Inc., would be unable to complete the building in accordance with the terms of its contract, and that 753 it would necessarily default in the performance of its contract, and that the payment by the plaintiff, therefore, of the said sum of $300,000 on the 5th day of December, 1930, was made in bad faith and in absolute disregard of the rights of the defendants, and that by reason thereof the liability of the defendants under their bond was released and discharged."

754 The Court: Is that part of your first affirmative defense?

Mr. Murray: The first affirmative defense.

The Court: What have you to say about that?

Mr. Schenck: I should prefer to have Mr. Murray tender such a proposed affirmative defense verified by the defendant. We have taken a large amount of evidence both in regard to the state of the building examined by both sides in the latter part of the spring of 1931. We have also introduced some evidence as to the lack of knowledge on the part of the
755 plaintiff of that situation on the 5th of December, 1931. I do not see how the defendants can take the responsibility of asserting that the plaintiff knew as a fact items of omission and incompletion and divergence on the 5th of December, 1930, without also taking the responsibility of stating that as a fact. Knowledge of a fact cannot be independent of the fact itself. If they will assert as a fact a verified pleading that that was the situation on December 5, 1930, I do not think I should object to its being interposed.

756 The Court: On that condition you may amend your answer.

Mr. Murray: I shall prepare, then, an amendment.

The Court: You can simplify it, Mr. Murray, by preparing not an amended answer, but an amendment to the answer.

Mr. Murray: That is what I had in mind, an amendment to the answer.

Mr. Schenck: Yes.

The Court: Let it be verified. 757

Mr. Murray: If your Honor please, I now move to amend the first separate defense by filing this separate defense in its stead (handing paper to Court)..

Mr. Schenck: I object to this proposed amendment at the present time, your Honor, on the ground, first, that it does not comply with the conditions stated at the end of yesterday's session. There is no assertion of fact whatsoever—

The Court (Interposing): Well, I did not impose that condition. That was one that you urged, and I did not—at least, I did not 758 want to be understood as saying that it was only on that condition that I would permit the amendment to be filed.

Mr. Schenck: Then, I misunderstood your Honor in that respect. This affirmative defense does not allege any basic fact; it does not allege what the situation was on the 5th of December. It alleges that whatever that situation may have been, we knew as much about it then as we know about it now; and that a payment was made—a payment with that knowledge was made in bad faith. That, 759 of course, begs the question as to what the situation actually was; and they have alleged our knowledge, not as in the first form; they have made a very substantial change, so far as their assertion of fact is concerned. In the twelfth paragraph of the answer before the amendment, they say that on the 5th of December, 1930, the building was in such a condition that it would have required a sum in excess of $170,000 to complete the same

760 and make it ready for occupancy, and that there were omissions of labor and materials from and substitutions of inferior materials in said building, amounting in value to a sum in excess of $230,000.

Now, they have made admissions of record in this case in detail on that subject, and an analysis of them throws quite a light upon their present proposed amendment:

They have admitted a total amount of items of incompletion of $109,000, of which total, however, $77,000—and I am speaking very generally—$77,000 are what might be called
761 "running" charges involved in completion—electricity, insurance—

The Court (Interposing): Are you speaking now of the admissions at the trial yesterday?

Mr. Schenck: Yes, sir.

The Court: Those admissions made by counsel with respect to the items on Schedules A and B?

Mr. Schenck: Yes.

The Court: Well, do not forget that those are not one hundred per cent admissions. As
762 I understood, most of them were admissions as to the fact, but not as to the necessity for the performance of the work.

Mr. Schenck: I have eliminated, in my analysis, all admissions that have been in any way qualified. For instance, in the figure that I just gave, of $109,000, the admission goes to the fact of the item, and also to the reasonableness of the item.

The Court: Yes.

Mr. Schenck: Wherever there has been a denial, I have— 763

The Court (Interposing): But does it go to the necessity for the performance of the work?

Mr. Schenck: Well, in regard to Schedule A, it goes to an admission of the incompletion of that particular item. I am merely pointing out that there is a difference of $77,000 between the two sets of allegations, which involve an admission of—well, they allege in their first affirmative defense that it would have required a sum in excess of $170,000 to complete the same; and then they admit, as a 764 matter of record, according to my construction of their admissions as to Schedule A, that it would have taken an amount of approximately $109,000 to complete the incomplete items, taking into consideration this $70,000 of admitted running charges.

They also admit in Schedule B, as a matter of record—and here also I have excluded in my analysis all items concerning which there is any denial—they have admitted items of incompletion to the value of $60,000.

Now, I think where they are seeking to 765 plead, after we have placed upon the stand Mr. Braislin, who has been subjected to cross examination with regard to the reasons he made these advances, and who has testified with regard to the knowledge that he had when he made those advances—and now for them to seek to change that issue, and at the same time not to take the responsibility of asserting what the fact was, after all of this evidence has gone in, and after all this in-

766 vestigation, makes their amendment insufficient in law, and also it does not change the issue. It is purely a plea to your Honor's discretion, under very unusual circumstances. There is no necessity for the amendment.

The Court: Well, it is one thing to argue that there is no necessity for the amendment; but to argue that you are in any respect disadvantaged as result of it, is another thing. I think we are not momentarily concerned with the form. As to the latter, I do not see that your proof is any way disturbed by this.

Mr. Schenck Oh, I do not claim prejudice.

767 If your Honor grants this amendment, I state now that I claim no prejudice from the granting of it; and I realize that it is an appeal to your Honor's discretion. I am merely urging that they have shown no reason for the amendment, and that they are attempting to assert a charge of fraud without taking the responsibility of asserting the basic fact.

The Court: I think the more important aspect is the sufficiency of that; but as I am disposed to give every leeway here, accordingly I shall allow the amendment, and you may note an exception.

768 Mr. Schenck: No; I shall take no exception. Now, will your Honor entertain a motion to dismiss this amended answer—and I shall not argue it at any length—on the ground that it is insufficient in law, because the basic facts of the situation of the building on the date which they have selected, the 5th of December, 1930, are not stated.

The Court: Let me understand: Was not the sufficiency of that defense considered by

Judge Bondy on the motion that was made before him? 769

Mr. Schenck: Not of a defense in this form.

The Court: Well, whether in this form or not, was it in substance?

Mr. Schenck: No, not in substance. The course of the amendment—and that is rather an emphasis of this situation—the great time of the court that has been involved in motions with regard to the pleadings in this case—and the form of the defense as originally urged was a specific allegation that on the 5th of December, 1930, the building would have required $170,000 to complete, and there were items of divergence and substitution of materials in the value of $230,000, and that we knew that situation at the time we made the final advance, and that therefore they were not liable. Judge Bondy held that that assertion of precise fact, plus an assertion of our knowledge of the precise fact, did not make a good defense in law; but that with additional elements added to those allegations, bad faith might be a conclusion that could be based upon them; and then they alleged that bad faith. Now, they have persisted in the allegations of bad faith, but they are entirely the two basic allegations of the defense; so that all that they have now is a begging of the question of what we knew, a begging of the question of what the situation was, and a conclusion of law that we acted in fraud. 770 771

Now, that is a fundamental change in two particulars, and we think that the fraud charge is not sufficiently pleased.

772 Mr. Murray: May I say a few words, your Honor?

The Court: Yes.

Mr. Murray: I think Mr. Schenck is being a little overtechnical. When they served their complaint alleging all these items of incompletion, omissions and substitutions, the allegations were denied. We denied that there were all of these omissions and so forth. In a separate defense, upon information and belief, which was based upon their own allegations in their complaint—that was the "information and belief"—on their own allega-
773 tions, we claimed that they had knowledge of these very omissions at the time that they made their final payment, and that when they made that final payment, with knowledge of those omissions, and with the intention of thereafter claiming against these defendants, that they were not acting in good faith in making a final payment of $300,000.

Now, substantially this defense as now pleaded is just the same as that other one was, except that Mr. Schenck has taken advantage of an admission in a separate de-
774 fense, based upon the allegations of his own complaint, as a fact proving his cause of action.

Now, as matter of fact, their own proof has shown that the items of incompletion are practically the same as what Mr. Billsborrow said. They now reduce their items of omissions far below what they were originally, as alleged. He would like us now still to be bound by the statement that there were omissions in those amounts, when they themselves

now do not claim those amounts; and because 775
of their change of position in their claim, whereby they do not now claim that there were $166,000 of items incomplete, and $230,000 of items of omissions, we want to amend our answer so as not to be bound by admissions which were based on statements which were based upon their own original allegations.

The Court: Well, we are not really arguing that matter now. The so-called "admissions" of your answer have been received in evidence—

Mr. Murray: Exactly. 776

The Court (Continuing): —as evidence for what they are worth; but the point made now is as to the sufficiency of your alleged affirmative defense. That is the question, but you do not include that point now.

Mr. Murray: I claim that this final advance was made on December 5, 1930, of $300,000. They knew that under the terms of their contract that building had to be completed on December 16, 1930. They knew what their inspectors knew as to the state of the building at that time, on December 5, 1930. They 777
knew that if their inspetors' report was correct that building never could have been erected on December 16, 1930, that there must necessarily have been a default. Their own proof here would show that those items could not be completed in eleven days. We propose to show that The Prudence Company knew that the Central Park Properties was in financial difficulties at the time that $300,000 payment was made; that they had defaulted

778 in payments to contractors; that they knew of that financial condition of the Central Park Properties, knew that there was going to be a default on December 16th and yet without any regard whatever for the surety companies made the final payment of $300,000.

The Court: Yes, and from that you spell fraud?

Mr. Murray: Exactly.

The Court: As I said when you made that statement, as a preliminary statement at the opening of the trial, your difficulty arises out of what may be an onerous contract, and what

779 you are really seeking here is not to support a charge of fraud, as I now view the matter, but what you would like to have is a modification of the contract, or you think it is an inequitable and unfair contract. That power which is recited in both the building agreement and the bond which is the subject of this suit gives this mortgagee a tremendous power, and so long as he keeps within the limit of his performance and fulfils his obligations under both those contracts it does not, it seems to me, lie now in your mouth to spell fraud out of what in fact may be only an in-

780 equitable contract or a contract that was perhaps unwise. Coming at this stage, speaking now of the bond, all the conditions being performed by the people who obtained your bond, and you having received your full premium, and it being an executed instrument, it is too late to have that performed.

Mr. Murray: I am not seeking any reformation, your Honor.

The Court: I know you are not. You are not in form seeking a reformation of that con-

tract, but in actual fact what you are asking me to spell out of the circumstances is that this was an inequitable contract and that the plaintiff here should not have been content to abide by the clauses of the contract but should have done something more. Not that the legal requirements indicate it, but that the moral or equitable requirements spell it out. Isn't that really what you are seeking? 781

Mr. Murray: No, your Honor. First answering on the question of fraud, of course there may be fraud without any moral turpitude attached to it—fraud in law.

The Court: You mean a constructive fraud. 782

Mr. Murray: The fact that a payment was made in bad faith does not carry with it an implication that they were morally wrong in doing this thing. As to your other question, the binding status of these provisions, in Paragraph Fifth of our bond it is provided: "In the event a conflict at any time exists between the provisions of the building loan agreement and the plans and specifications, the plans and specifications shall control as to any such conflicting item or items."

The building loan agreement assumes to state that this, that and the other thing shall be approved in writing by the lender. In the very specifications upon which this contract was based, the general conditions, we have this paragraph: "Article 15. Changes in the Work. The owner without invalidating the contract may order extra work or make changes by altering, adding to or deducting from the work, the contract sum being adjusted accordingly." 783

784 The Court: That must be on written consent. That must be on some writing.

Mr. Murray: No, the owner is given absolute discretion.

Mr. Schenck: Oh, no. Written authority of the owner, countersigned by the architect. It is that same clause that you just read.

The Court: What is there said about that, this clause about written authority?

Mr. Murray: The written authority provision is contained in the building loan agreement.

Mr. Schenck: No, in the specifications. The
785 very article that you read. No extra work or change unless a written order from owner, countersigned by architect, or a written order from the architect. Article 15, page 4 of the specifications.

Mr. Murray: "In pursuance of a written order from the owner signed or countersigned by the architect, or a written order from the architect." In other words, the architect might order changes in the work, or the owner might order changes in the work, and here we say that the owner ordered changes in this work. I grant you, your Honor, that
786 this borrower could not in any event make such changes in the work to be done that he was going to construct a building there not contemplated by the parties and which was going to be no sufficient security for the lender's money. But otherwise if he did build a building in substantial accordance with the plans and specifications, and either as good in quality or better, that the lender could have no claim for damages in the event of a foreclosure. We claim that that is exactly what

has happened here—that the owner did in many instances order additional work not provided by the plans and specifications; in certain instances he altered the work to take out this, that and the other thing, but in the final analysis the question is whether the omissions, as I will call them, are less than the additions, and in the final analysis have they a building there which is just as good as was contemplated by the original plans and specifications? I say that under the provisions, the general conditions, of the specifications the owner did have the right to change, and that because it did change does not ipso facto give The Prudence Company a claim. If it changed so that it decreased the value of the property, taking into consideration all the changes, then The Prudence Company has a claim. 787 788

The Court: I am afraid you may be right about that, but it would seem to me that that means we would have to read something into the contract which I do not find there.

Mr. Schenck: The bond is specific against anything except written waivers, and it is the bond we are suing on. Of course, this argument of Mr. Murray has nothing to do with this defense of fraud. 789

The Court: No, I know.

Mr. Schenck: Of course, I do not want to argue during the course of the trial.

The Court: No, frankly this is not the moment for continued argument on this point. I shall deny your motion to strike out this amendment.

Mr. Schenck: I think I should just for the purpose of the record take an exception.

790 Mr. Murray: May we have the amended answer marked as an exhibit, or filed with the papers?

The Court: Filed with the papers.

ARTHUR S. LUKACH, resumes the stand.

Cross examination continued by Mr. Murray.

Q. Are you familiar, Mr. Lukach, with the different items listed in these several instruments, without having something before you for a reference? A. I think so. In general I am.

791 Q. Item 5 of Schedule A has to do with the elevators, the Otis Elevator Company. Do you know when that work was completed? A. It was approximately, I should say, somewhere in the months of—in the latter part of May, or June, is the best of my recollection.

Q. Do you know when the work was started? A. It was started very shortly after the contract was signed, whatever the date is on the contract.

Q. I show you some papers that Mr. Williams was good enough to hand me (handing witness), and ask you whether that would refresh your recollection as to when the contract was made? A. I

792 should say from these the latter part of May.

Q. When you originally inspected the elevator work prior to getting in touch with the Otis Elevator Company what did you find the status was? A. Why, when I first came there the first item that impressed me was that some of the elevator pits were full of water, one car as I remember was running, the signal equipment had not been completed, and in general the final overhauling and

inspection of the control boards and overhead ma- 793
chinery and motors had not been completed.

Q. Wasn't the situation such that the elevator equipment was all in but that what was required was a final inspection and final oiling up and final preparation for operation? A. I imagine that the majority of the equipment was in.

Q. Do you recall any particular items of equipment which were not in? A. Yes.

Q. What? A. The chain connecting the driving mechanism which actuated the signal control. I know that was not in, definitely.

Q. When did you first get in touch with Otis Elevator regarding the completion of this work? 794
A. Some time in May.

Q. Not earlier? A. I cannot recall.

Q. And wasn't there some refusal on the part of the Otis Elevator Company to proceed to do any work unless they were paid some part of the sum still owing to them? A. That is correct.

Q. And wasn't the amount which they required to be paid $14,500? A. That is right.

Q. And is that the $14,500 which is stated in Item 5, subdivision (a)? A. If it is stated there, it is so. I have not got that.

Q. It states here: "Elevators. To Otis Ele- 795
vator Company for: finishing work according to original contract with Central Park Properties, Inc., $14,500." A. That is correct.

Q. In other words, that was a payment to the Otis Elevator Company for work which they had already done but for which the Central Park Properties had not paid them under their contract? A. No, that is not quite right. It is not for work already done, because they did work under that contract for $14,500.

796 Q. But some part of that was on the past due payments; isn't that right? A. That I am not prepared to state. It all depends on the way the Otis Elevator Company figured the job.

Q. Isn't it a fact that the Otis Elevator Company told you that they were not interested in coming in there and doing any further work until they had been paid some part of what was already owing to them? A. That is right.

Q. And don't you know that at that time the Otis Elevator Company was claiming against the Central Park Properties Company the balance of their contract price? A. In what amount was that?

797 Q. Some $80,000. A. No, I did not know that figure until much after that time.

Q. You did learn it subsequently; is that right? A. Quite recently, yes.

Q. So that part of this $14,500 at least was a payment to Otis Elevator Company on their contract with Central Park Properties before they even went in there to finish what was necessary? A. I assume that part of it was.

Q. Don't you know what part of it was? A. No, I say I assume, because I feel that the work they did, did not amount to $14,500.

798 Q. With whom were the negotiations had? A. A representative of the Otis Elevator Company. I have forgotten the gentleman's name at this time.

Q. Did you have the negotiations yourself, Mr. Lukach? A. I had the negotiations with the Otis representative.

Q. And no one else for The Prudence Company? A. No one else for The Prudence Company.

Q. Did you discuss with The Prudence Company the advisability of paying to Otis Elevator some of this past claim which they were making for the breach by Central Park Properties Company? A. I do not recall that I discussed that. 799

Q. So that the $14,500 which is mentioned in this item is not for incomplete work entirely? A. It was the amount expended necessary to complete the job. The job could not have been completed without that expenditure.

Q. I will repeat the question, Mr. Lukach. $14,500 was not really the value of labor for completing the job, was it? A. No.

Q. Now do you know how much of that $14,500 is equitably to be allocated to actual work performed, and what part of it is to be allocated to payment to Otis Elevator on claimed indebtedness of Central Park Properties? A. I cannot allocate it. 800

Q. I show you an agreement dated the 27th day of April, 1931, between 58-59 Realty Corporation and Landsmann Bros. and Soffin, and ask you whether you recognize that instrument (handing witness)? A. I do.

Mr. Murray: I offer it in evidence.

(Painting contract marked Defendants' Exhibit I.) 801

Q. In Schedule A there is an item of $72,882 under painting. Is it from this Defendants' Exhibit I that that amount is made up? A. Yes.

Q. Before entering into this contract, Mr. Lukach, you had asked for bids from different painting contractors, had you not? A. I did.

Q. When were those bids sent out, approximately—or when were these requests for bids sent

802 out? A. I can refer to my notes and tell you exactly, but I should say approximately the requests for bids went out some time in April.

Q. This contract is dated April 27th? A. Yes.

Q. Would you say it was some two or three weeks before the making of this contract? A. I should say yes, that is right.

Q. And did you get bids from other contractors? A. I did.

Q. And among the people from whom you requested bids were the original painting contractors on this job; isn't that so? A. That is correct.

803 Q. And when you sent out your requests for bids you sent out some sort of statement of what you wanted done and alternates? A. That is correct.

Q. Were there alternates? A. Yes.

Q. Have you got the copy of the request for bids which you sent out at that time? A. I think I have a copy of a letter. With that letter there is a specification on which they figured.

Q. May I see that letter, Mr. Lukach, if you can put your hands on it readily? A. It may be in the painting folder; I am not sure.

(Mr. Judd hands witness papers.)

804 Q. Well, unless you can put your hands on it readily, Mr. Lukach, we won't delay at this time. A. It is here somewhere. I can get it afterward.

Q. Probably somebody else may be able to find it for you. Now prior to sending out these requests for bids you had made your detailed inspection of the building? A. That is right.

Q. And determined what the condition of the painting was at that time? A. That is correct.

Q. When had you started your investigation or inspection? When did you first see the painting which was then on the walls? A. As soon as I went into the building for the first time I noticed it. 805

Q. And that was on or about April 1st? A. That was on or about April 1st.

Q. Did you find painting in every room in the building where painting had been required by the original specification? A. As I recall it there were some rooms were omitted. In most of them the painting had been started.

Q. Could you tell by your inspection how many coats of paint had been put on? A. Yes. 806

Q. And where paint had been put on in these different rooms would you say that all of the coats had been put on except the final coat? A. Two coats had been applied, a sizing coat and then the second coat.

Q. And under the specifications how many coats were required? A. As I recall it three were required on the walls.

Q. Two had been applied and one remained to be applied; is that right? A. That is right.

Q. In examining this painting job, Mr. Lukach, what would you say would have been the reasonable cost of applying the final coat of paint? A. I am not prepared to state that. 807

Q. You have a fair idea of the amount of space which would have been required to be painted? A. I know the size of the hotel and the number of rooms.

Q. What basis did you use to determine whether the ultimate bids which you received were satisfactory or not, as regards price? A. The estimates which I obtained and my own experience.

808 Q. In your experience haven't you arrived at any conclusion as to what it might cost to put a final coat of paint on a building? A. Well, this job is a little—is quite different from the ordinary painting jobs that you run across. If you take a new building you know approximately how much it is worth to finish that room, but when you have a building that has been started, and particularly when the paint was of an inferior quality which would require a lot of patching and sparkling, as they say, it is almost impossible, outside of a painter, to judge that, and then he would have to go into it very carefully.

809 Q. Then do you say the paint was of an inferior quality? A. I do.

Q. Do you say that it did not comply with the specifications? A. I do.

Q. In what respect? A. In the first and most important respect there was insufficient sparkling, and perhaps I better tell you what "sparkling" is, and for the Judge, so he will know. When there are rough parts of the plaster, if there are any little concave sections they have to be filled in with a preparation called sparkling, which is very like plaster of Paris. If there are any parts stick out from the wall they have to be sand-
810 papered down, and all those filled with sparkling, and they have to be touched with shellac so as not to have that absorb into the plaster of Paris. That takes time, and I noticed particualrly here there were a number of places where it had not been done.

Q. When you made your inspection of the painting job which was then done, that part of it which was done, you knew then whether or not the materials were defective or not in accordance with

the specifications, didn't you? A. That is right, yes. 811

Q. Yet you made a request upon the original contracting painter to submit a bid, did you not? A. I did.

Q. Did you think that the work which you saw there in the building had not been properly done? A. I did.

Q. And yet you asked the same contractor who had done that work to make a bid for the new work? A. I did.

Q. When you requested bids for the painting did you request specifically a bid for the completion of the painting incomplete, using the other paint 812 that was on there as a basis? A. Naturally. We could not take the paint off the walls when it was there.

Q. If a contract requires the placing of three coats of paint on a building, Mr. Lukach, and two coats have been placed thereon, what would you say the proportion of the work is that had been done? A. I am sorry, I will have to beg that question, because there was another factor entering into it which has to be spoken of before I can answer that completely.

Q. What is that factor? A. The fact that be- 813 cause of two reasons two coats were necessary instead of the one originally specified, and the two reasons for that are because we had sparkling again, and in sparkling all those sparkling spots would stick out, and one coat would not cover; and the second is that the building had stood so long that the original painter and also the one who finally got the job—it had lost its tackiness, a slight stickiness, and it would not hold the final coat. Those were the reasons.

814 Q. What causes that condition of tackiness, Mr. Lukach? A. The fact that the paint had dried and hardened standing exposed without the final coat.

Q. It is very often the case, is it not, that the original coats of paint may stand without being painted over for months and months? A. No, not to my knowledge. That is the exception rather than the rule. In the ordinary course of painting one coat usually follow the other after it is dried.

Q. Don't you know it is the fact in New York City, in the erection of apartment hotels and apartment houses, that the last coat of paint is
815 reserved for the time when the tenant picks it out? A. In my own experience that has not been the case. We have always completely painted the buildings.

Q. Do you know whether that practice is followed at all in New York, that I mentioned? A. It may be followed by others, but I am not prepared to state because I do not know from my own experience.

Q. You say it is not followed by Bing & Bing? A. It is not followed by my own experience, and I do not know what others have done.

816 Q. Do you say you know of no case where the final coat of paint has been reserved for the time when the tenant comes in? A. The only case I know is the Essex House.

Q. Do you say it would make any difference so far as this question of tackiness is concerned whether the building were tenanted or not? A. I don't think that would, no.

Q. The very fact that the building is not tenanted would have nothing to do with the tackiness feature of this paint? A. No.

Q. In your estimation how long will the basic two coats of paint remain sufficiently tacky before the final coat is put on? A. I should say approximately six weeks. Somewhere in that neighborhood. Two months. 817

Q. If necessary will you examine this contract and tell us just what work was done under it (handing witness)? A. What work was done under the contract?

Q. Yes. A. There are two specifications attached to this contract. One is the original Grad painting specification and the other is the one I drew myself.

Q. The one which you drew yourself is entirely separate and distinct? A. That is correct. 818

Q. And additional to the Grad specification? A. That is right.

Q. And that specification was drawn with your previous knowledge of what you considered a good painting job? A. That is right.

Q. Why was there any necessity of using the Grad specification at all? A. Because I had in mind that there might be some legal trouble with the bonding companies.

Q. Who told you that, Mr. Lukach? A. I think I discussed it with one of the officers of Bing & Bing. 819

Q. And Bing & Bing knew that there was a surety company interested here? A. I imagine they did know.

Q. Just what was the result, then, of using the Grad specification at all in the contract? A. It was necessary to have the Grad specification part of the contract in order to arrive at the price.

Q. With the Grad specification in there was there a price based upon the Grad specification? A. Yes.

820 Q. Different from the other price? A. Yes.

Q. What was the price based upon the Grad specification? A. $90,800. That was the Grad specification plus the additional coat of flat wall paint that I mentioned, on the living room walls, chamber walls and other places, plus two coats of cement floor paint in all closets, stair halls, stair treads and platforms, servants' rooms and servants' corridor on second floor, office room on mezzanine floor, all cellar floors and all machine and elevator rooms throughout the building, all as proper and necessary in a building of this character.

821 Q. Where do you get the figure $90,800 on the Grad specifications? A. My original estimates and bids were based on the specification which I sent out. After getting the lowest possible price from the contractor I thought suitable, I then asked him to submit a price based on the Grad specification. That is the way I obtained the $90,800.

Q. Was there included on that bid or this figure of $90,800 any consideration for work already done? A. Yes, of course.

Q. Maybe I can get it another way. When you asked for the bid on the Grad specification did
822 you simply ask for a bid on that specification regardless of what had been done before? A. No, I asked for it to complete the work according to the Grad specification.

Q. To complete the work? A. Yes.

Q. So that to complete the work under the Grad specification it would have cost $90,800? A. That is correct.

Q. But you actually did practically a new job for $72,000; is that right? A. No, it was not a

practically new job. It was just finishing up in addition to the work that had been done. 823

Q. Well, wasn't the bid on the Grad specification to finish up on the work already done? A. That is correct.

Q. And that was, you say, $90,800? A. I do.

Q. What was done was to finish up on the work already done? A. Yes, but not according to the Grad specification. According to my own, which differed materially.

Q. And do you say that the material which you used was not as good as— A. No, I do not say the material; but there were certain things in the Grad specification which I thought would be foolish to go through with, because of economic reasons, and my specification was a much more economical one. 824

Q. Do you say that there is a good job there now? A. As good a job?

Q. Do you say there is a good job there now? A. I say there is a good job there now; yes, sir.

Q. In spending $72,000 for painting, was there any part of the previous painting made use of? A. Yes.

Q. What part of it was made use of? A. Ceilings that were calcimined properly, and the two coats of paint on the wall, and the one coat of paint on the trim. 825

Q. The paint on the trim was all right in your estimation? A. In my estimation it could have been a little thicker paint.

Q. But it was sufficient for the purpose; is that it? A. Sufficient for the one coat that was there. There was one big difference, Mr. Murray, in the specifications that would account for a large part of this difference in the contracts. If you are interested I will tell you.

826 Q. I am very much interested. A. Mr. Grad called for three coats of paint on the ceilings, and my specification called for calcimining. Three coats of paint is very expensive. That makes for an excellent job.

Q. When you examined the building, the rooms, you found molding on the walls, did you not? A. I did.

Q. And where was this molding—in how many of the rooms? A. As I recall, the majority had panel molding on the walls.

Q. The majority of the living rooms and bedrooms? A. Yes.

827 Q. And the servants' rooms? A. No, not the servants' rooms.

Q. But all the living quarters had molding around the walls? A. That is right.

Q. Was that molding removed? A. Yes, it was.

Q. And who performed the labor of removing all this molding? A. The carpenters.

Q. There is not included any carpentry bill in Schedule A, which we have previously discussed —any charge for the removal of that molding? A. No, there is not.

Q. Now, didn't the removal of the molding from the walls affect the walls in such a manner that 828 a considerable amount of painting would be required—considerably more painting would be required than if the molding had not been removed? A. That is correct.

Q. Now, do you know whether the molding had originally been placed on the walls before or after any painting? A. The molding had been placed on before the original painting.

Q. So that underneath the molding there would be no paint whatsoever? A. That is right.

Q. How much more would you say it would cost to paint all those rooms because of the fact that the molding had been removed, than it would cost if the molding had not been removed? A. This contract did not include the removal of the molding. That was done after the painting was awarded. Anything paid for sparkling the walls, because of the removal of the molding, was paid for extra and in addition to the contract. 829

Q. Then, you say that the contract only took care of the painting of the walls with the molding on? A. That is right.

Q. And when was the painting done, after the molding had been removed? A. When was the painting done after the molding had been removed? 830

Q. Yes. A. Shortly after the painting work was started there.

Q. Will you please make clear this: whether this firm which had this painting contract, of which we are now speaking, in the defendants' exhibit which you hold in your hand—whether that contractor painted the walls which had been underneath the molding? A. He did paint the walls, yes.

Q. But not under this contract? A. I am not quite sure of that, but I can tell you very quickly. (After examining papers.). Yes, there was nothing mentioned here, but—let me see—I will have to take back what I said before. I note that there is a sentence here that the panel molding will be removed from the living rooms, bedrooms, and pantries. 831

Q. Was there any specific amount allowed for the doing of the additional painting because of

832 the removal of the molding? A. I don't recall that there was a specific amount allowed, no.

Q. Have you any idea of what the original cost of painting was, because of the removal of the molding? A. No, I have no idea now.

Q. Well, did you make any estimate at the time you were asking for bids? A. I don't recall that I did.

Q. Did you ask the bidders to allocate a specific amount as extra cost of painting because of the removal of molding? A. I don't recall that either —yes, I have that here. It is right in the contract: "For sparkling all walls, due to the re-
833 moval of panel molding throughout the building, $5,000", so that since that was deducted, it is not really charged up to the cost of painting.

The Court: Is that included in that $72,000?

The Witness: No, that is not included in the item of $71,650 or whatever it is. That has been deducted.

Q. I have not been able to read this contract, and it is so long and there are so many details in it, that I would like you, Mr. Lukach, to explain the different items in there, so that we may arrive
834 at the sum of $72,000 which is mentioned in Schedule A. A. The initial contract under the original Grad painting specification is $90,800—

Q. (Interposing.) Pardon me. The original contract— A. Yes. This is the contract I mean, of $90,800.

Q. And that is a contract between whom? A. Between the 5859 Realty Corporation and Landsman Brothers & Soffin.

Q. Do I understand, then, that there was a contract for $90,800 made for the doing by this contract of the work called for by the Grad specifications; is that right? A. There was a contract made in the amount of $90,800; and then there were certain additions and deductions, which brought the net amount paid to the contractor down to the price that you see in the schedule, plus some ceilings which were to be rekalsomined. 835

Q. But that $90,800 was the contract price for the doing of the work required by the Grad specifications? A. That is correct.

Q. In other words, if there had not been a bit of paint on that building, and the Grad specifications had been handed to the painter, his contract bid would have been $90,800, is that right? A. No, that is not correct. I think the contract specifically says "For finishing all painting". Not doing the painting from the original beginning, but for all the painting according to the specifications prepared by Frank Grad. 836

Q. And that amount of $90,800 is on top of whatever might have been done before? A. That is correct.

Q. Now, will you go on fairly slowly to state what deductions and additions were made? A. There were certain deductions and additions made, which brought the net price of $90,800 down to a price of approximately $71,000. Do you wish me to read all the items to you? 837

Q. I would like to have you do that, yes. A. "Should the builder require the painting for the entire building to be completed according to the specification, with addenda prepared by the 58-59 Realty Corporation, and attached hereto, instead of the specification of Frank Grad, above referred

838 to, there shall be deducted from the above price the sum of $19,150, made up as follows—"

Q. (Interposing.) Now, just a moment: So that you, in the preparation of your specification, left something out which was in the Grad specification? A. That is correct.

Q. Now, what was it that you left out, which accounts for the difference of $19,000? A. Well, I am prepared to tell you how that $19,150 is arrived at—which is the answer that you want?

Q. Yes.

The Court: You do not have to read everything on that schedule?

839 Mr. Murray: No.

The Witness: Well, the big item was for not washing off kalsomine from all ceilings, and painting with three coats of flat paint—as was called for by the Grad specification—deduct $32,000. There was another deduction in the amount of $2,700, and another deduction in the amount of $4,200, making a total of $38,900 of deductions. Now, I have certain additions—

Q. Just a moment: That would bring the total below $90,000, to $58,000, is not that right? A.

840 Whatever it is, yes.

Q. About $58,000, if those three items were not done? A. That is correct.

Q. Now, will you proceed? A. Yes. There were certain additions made. If you want me to read them—

Q. No. Just give me the dollars and cents of them. A. For sparkling all walls, due to the removal of panel molding throughout the building,

that was an addition of $5,000. For hanging lining— 841

Q. The sparkling was not a complete painting job on the parts of the walls where the molding had not been removed? A. Not a complete painting job, no; not sparkling and touching up with shellac.

Q. And that allowance was what? A. $5,000.

Q. Just for that sparkling? A. Just for that sparkling.

Q. And no painting? A. No. For hanging lining paper, wall-paper, and applying one coat of gelatin and one coat of varnish on walls and ceilings of guest-bathrooms, add $2,700. 842

Q. These items that you have just read are in addition to the Grad specifications? A. Yes, those were our own ideas of certain things that we wanted done, which we are not charging for.

Q. Did you add anything to that $5,000 for sparkling, for painting? A. No.

Q. Those particular parts of the ceilings or walls? A. No. The sparkling included just the paint on top of the sparkling. In sparkling you put on a coat of shellac, and then a narrow brush of paint right over that, so that the sparkling will not come through. It does not include complete painting of the wall, but just where the sparkling is done. 843

Q. But on top of the sparkling you had to paint? A. Yes, just a dab of paint to cover it up, so that the next coat would not be absorbed. There is an item of $600 for painting required because of alteration on the first floor. Another item of $6,500 additional for hanging lining paper and wall-paper on the walls of the public corridors and elevator vestibules. Another item of—

844 Q. Pardon me. You are going a little too fast for me. Then, there was papering done in the building? A. There was papering done, yes.

Q. And how much papering? How much of the building? A. All of the public halls, with their adjoining elevator entries, and the bathrooms were papered.

Q. Now, previously there had been some paint on those walls? A. Yes.

Q. When you paper, do you require any base for the papering? A. Yes, you require a lining paper.

Q. A lining paper? A. Yes.

Q. But do you require any base in the nature of
845 paint? A. No. There is another item of $3,350 for removing the kalsomine from ceilings of furnished apartments, and rekalsomining with colors to match. That is $3,350. Thus making a total of $19,750 of additions, which, deducted from the total deductions, gives a net deduction of $19,150; and if this is subtracted from the original contract, then you have the price that was actually paid, outside of the extras.

Q. Now, how much wall space was covered by paper? A. I can tell you. I can just tell you what sections of the building, but I can not give you the number of square feet of wall space.

846 Q. Did that $90,800 estimate for the work, based upon the Grad specifications, include the painting of all these corridors and walls where paper was subsequently placed? A. That included no paper at all, but only the painting as per the Grad specification.

Q. But it did include painting of those places where the paper was subsequently put on? A. Yes.

The Court: I understand that the Grad specifications which were included in the contract, Defendants' Exhibit I, had been included in the original Grad specifications when the contract was signed? 847

The Witness: I am sorry, Judge. I did not understand that. The original Grad specification is a part of this contract—

The Court: It is?

The Witness: Oh, yes. The two specifications—the Grad specification and the one that I prepared.

The Court: I am not talking about that.

The Witness: The Grad specification is a part of this contract. 848

The Court: When Mr. Grad drew up the specifications for that contract or when you used them in this contract, you did nothing more than to refer to his original contract, and take such part as was pertinent to that particular job?

The Witness: His original specification, yes. I took his painting specification out, as an entity, and made it part of this contract.

Q. Now, after the molding had been removed, Mr. Lukach, in addition to putting a coat of sparkle on the spaces which were then uncovered, you had also to paint them with two coats of paint? A. That is correct. 849

Q. Now, when you went through this building on your inspection, you made a note of everything that you saw that was undone or improperly done, did you not? A. Yes; unless there were certain objects that were very evident, because they were lacking from where the plans showed them; and then I just simply remembered them. For ex-

850 ample, the bronze grills, which were shown on the plans, but which were not in the building—

Q. I show you now Plaintiff's Exhibit No. 84 (handing witness). That is your list of uncompleted items, is not that so? A. That is correct—required to complete the building.

Q. Now, at any time prior to your preparation of that, did you see any estimate of anybody connected with the Prudence Company as to the cost of completion? A. I did.

Q. Do you remember when you saw that? A. Yes, approximately when I first went to the job.

Q. Do you remember that it was Mr. Billsborrow's estimate of the 16th of December, 1930 (exhibiting paper)? A. I remember seeing a number of Mr. Billsborrow's estimates. I am not sure of the exact date.

Q. Now, will you go through your list there, and leaving out the painting, the painting item, and leaving out the elevator item, and leaving out payrolls and taxes and electric lights, and steam, and considering only the actual items for the doing of the physical work in making complete the incomplete items, see how it compares with Mr. Billsborrow's estimate of December 16, 1930? A. You want me to compare trade by trade, and then

852 the prices?

Q. No, the totals. A. Oh, the totals?

Q. Yes. A. My—

Q. No. The totals. A. The total item for each trade?

Q. No, the entire total? A. I will have to deduct what you have just mentioned out of here—the elevators and the painting—

Q. Well, without doing that now—without deducting the actual items in dollars and cents, just

go through your estimate, and leave out all of these items that I have mentioned, and say what comparison there would be between Mr. Billsborrow's estimate of $9,500, exclusive of painting, and your estimate? A. Well, my answer immediately should be that this was much less than mine, and covered many less items. 853

Q. Now, roughly, the electric current bills were $5,000, and the Otis Elevator item is $14,500, making $19,500; the insurance is $1,600; making $21,100, approximately; the payroll is $20,000, making $41,100; the steam consumption is some $13,000, making $54,100; supervision is $6,500, making $60,600, plus; taxes $57,000, making about $117,00—is that right? 854

The Court: $115,000.

Mr. Murray: $115,000; is it?

Q. And the painting is $72,000, making about $189,000?

The Court: $187,000.

Mr. Murray: Yes, $187,000, without taking into consideration the odd dollars.

Q. Now, the difference between that and the total of $210,000, is about $23,000, is not that right? A. Yes. 855

Q. Now, I will hand you Mr. Billsborrow's estimate again (handing witness), and I ask you whether there is an item of bronze on there? A. There is an item of ornamental iron and bronze.

Q. And there is an item of carpentry? A. An item of carpentry finish.

Q. And an item of cement? A. Cement floor, and base.

Q. And is there an item of damp-proofing or water-proofing? A. No.

856 Q. Is there an item of electric,—missing parts? A. There is an item of electric fixtures.

Q. Is there an item of fireproof windows, missing stools? A. Fireproof doors hung, and bucks.

Q. Well, I find that here under "fireproof doors and bucks". There is no additional item there for fireproof windows? A. No.

Q. Like the missing stools? A. There is an item for metal sash and hardware.

Q. Is there an item for floors? A. There is an item for wood floors.

Q. Yes. Is there an item for glass? A. Glass and glazing.

857 Q. And an item for hardware? A. There is an item for hardware, yes.

Q. And an item for incinerator tools? A. No.

Q. You said there was an item for ornamental iron? A. Yes, that was included with bronze.

Q. Is there any item for kitchen cabinets? A. Yes, an item for apartment kitchen cabinets.

Q. And kitchen equipment? A. No.

Q. There is an item for lighting fixtures? A. Electric fixtures, which I presume is for lighting.

Q. And there is an item for cleaning, is there not? A. There is an item for removal of rubbish.

858 Q. Is there anything for plastering? Is there any item for that? A. Yes, an item for plastering.

Q. And plumbing? A. Yes, a plumbing item.

Q. Does that refer to curtains—shower curtains? A. I don't know what he had in mind.

Q. Is there anything for refrigerators? A. No.

Q. Steam-fitting? A. No.

Q. Terrazzo? A. No.

Q. Now, deducting Mr. Billsborrow's painting estimate of $14,000, we have remaining an item of

his of about $9,000, for performing all incomplete work; and that compares with your $23,000 for doing practically the same things—that is, the same items? A. No. You are deducting quite a number of items from that. 859

Q. Yes. A. And there were a lot of things that he did not include at all.

Q. I have deducted from Mr. Billsborrow's estimate the painting, and I have deducted from yours painting and elevator? A. But that is not a fair comparison, unless you add on the things that are lacking in his schedule, which I have in mine.

Q. Well, what else is there— A. (Interposing.) You mentioned, for example, a small item of incinerator tools, and kitchen equipment, and I think possibly a few other items. 860

Q. Well, those items bring your estimate $9,000 above your Billsborrow's? A. Yes, but you can not compare the two, because they are unalike.

Q. There is a difference of $14,000 in the two estimates? A. Yes.

Q. Roughly speaking? A. Yes, of course, roughly speaking.

Q. Without bothering with the dollars and cents. And, naturally—well, not "naturally," but in Mr. Billsborrow's estimate there is no consideration given to the items which you have included in your Schedule B, as omissions and substitutions? A. I can not tell, because the sum is lumped together there. 861

Q. So that as far as his estimate shows, there may be some such items in his estimate? A. I am not prepared to state what is in his estimate.

Q. Leaving the painting item out of Mr. Billsborrow's estimate, would you say it was an unfair

862 estimate of what it would cost to put in the lacking things? A. Exceedingly unfair.

Q. In what respect? A. That as far as I can see, it was practically entirely incomplete. It did not cover the items that were lacking.

Q. Well, it would only leave out $14,000—even according to your estimate; is not that right? A. But it did not take into consideration any of the substitutions and omissions from the original specifications.

Q. Exactly. I have indicated that he did not include in his estimate these omissions and substitutions of yours, which were included in
863 Schedule B; but I mean having in mind only Schedule A— A. (Interposing.) Well, it did not cover Schedule A completely either.

Q. Not completely? A. No.

Q. Certainly not? A. No.

Q. Did you know the contract price at which the original painting job was let? A. I was informed by a representative of the original painting contractor of a price which he said was the original contract price.

Q. Do you remember what that was? A. I would have to refer to this (indicating).

864 Q. Well, if I state that it was $56,000, would that refresh your recollection? A. No, because I think that was not the price that he told me. I have it here. I made a note on April 1st, 1931, entitled "Memorandum from Globe Painting Company," and their original bid for a complete job to Lefcourt was approximately $81,000. The contract that they received was in the amount of $44,000, and consisted of one coat of paint for all trim, two coats for all walls, serving pantries and

baths to have two coats; stair halls three coats; iron work one coat. The two coats on walls consisted of sizing, and one additional coat, and was never meant to be finished. Then there are some other items there—the total amount of sparkling— 865

Q. What was the total price? A. The price that they told me was $81,000.

Q. Do you know whether that $81,000 included decorating— A. I do not. This is what I have down here—what I was told.

Q. If on a total contract price of $56,000— A. I am sorry. I did not get that.

Q. I say, if on a total contract price of $56,000 for painting this building, $14,000 had been reserved for the final coat of paint, would you say that that was a proper amount for such reservation? A. I would say that was an improper amount. 866

Q. And that the final coat of paint would cost more than $14,000? A. No. I mean I can not agree that the price of $56,000 was a fair price for doing that painting of the building properly, so I certainly cannot agree on $14,000.

Q. Do you know whether there was any change in the cost of materials between 1929 and 1931? A. It was practically the same, as far as I know. There was not much of a change in that period. 867

Q. Do you know whether in 1930 prices for painting materials were high or low, comparatively speaking? A. As compared with—1930 as compared with what year?

Q. As compared with either 1929 or 1931? A. I should say it was about the same.

868 The Court: I suppose that the labor item, though, was less in 1930 than in 1929, or 1931 was less than 1929?

The Witness: Yes.

Q. Do you know whether the labor item was less in 1931 or greater—lesser or greater in 1931 than in 1930? A. I am not prepared to state.

The Court: There were Union wages?

The Witness: Oh, yes; all Union wages. All the work was done under Union wages.

Q. Now, will you explain to me, Mr. Lukach,
869 the item in Schedule A, being Item 3-C, of V. Foscato, levelling cement floors? Will you tell me what cement floors, where, and why? A. We placed a wood floor on approximately 60 per cent of the cement floors in the building; and before actually starting the laying of the wood flooring, we noticed that some of the cement floors were so much out of level that it would have been impossible to lay the wood floors on them, so these unlevel spots were ground down by terrazzo workers.

Q. And where were these wood floors that you were putting on? A. They were applied generally to 60 per cent of the building—throughout the
870 building.

Q. In what parts of the building? The living rooms? A. In the living rooms and bedrooms—

Q. In the apartments? A. Yes, in the apartments—the master section.

Q. Have you any independent recollection of how many of these rooms required that levelling process? A. No, but I can refer to the total number of hours spent in grinding them down. We have the bills to show for that.

Q. Now, as to Item 17, subdivision (b), water- 871
proofing elevator pits, do you know whether or not the elevator pits had been originally waterproofed? A. I don't know whether they were originally waterproofed, no.

Q. Who examined the pits for you, on which you based your conclusion? A. That they were not waterproofed?

Q. No; that there was waterproofing necessary to be done there? A. I examined them. Certain pits were full of water, and the elevator machinery was all ruined.

Q. Did your investigation permit you to de- 872
termine whether or not the pits had ever been waterproofed? A. No.

Q. That is, you could not determine whether they had ever been waterproofed? A. No, because they may have used an integral waterproofing mixture with the concrete, and it would not be possible to determine that.

Q. I see. So that if I told you that the pits had originally been waterproofed, there was nothing about the appearance of the pits to you, to indicate anything other than probably a bad job was done? A. I could not say. I did note that they were full of water, and had to be waterproofed. 873

Q. Waterproofing consists of what? A. It consists of either putting right into the cement some waterproofing material—some compound or chemical in the cement when you are mixing the concrete, or you may apply it to the surface. There are two methods.

Q. Which method was used in this instance? A. The surface method.

Q. Now, Item No. 6-A, under "Fireproof windows," Mr. Lukach, mentions missing stools and

874 trim. What is that item? A. The stool or apron is what we generally know as the sill. In the building there were metal sills there, and a lot of them were missing. Also some molding on the windows, some hardware, handles to raise the sash, and some catches to lock it.

Q. Now, at what part of the construction of a job are the stools put in? A. The stools are put in fairly early, before the plastering usually—the metal stools are.

Q. What occasion might there be for stools not being in the windows? A. What occasion?

Q. Yes. In other words, I think it is peculiar
875 that stools should not be in the window sills, or that a window sill should not be in, in some of the windows? A. It may have been due to the fact that the contractor left hurriedly, or that there was insufficient inspection on the part of the builder. I am not prepared to say why.

Q. But that work would have been done early in the construction job? A. It should have been done early, yes.

Q. Is there any possibility of their having been removed after they were placed on? A. It is possible.

876 Q. Do you know whether the indications showing around the windows showed that they were ever originally installed, or that they were never originally installed? A. I can not recall that now.

Q. Do you know whether under Item 9-A the Builders' Wood Flooring Company ever had any connection with the ballroom floor originally? A. I don't know whether they originally had any connection with it or not.

Q. The item for scraping and finishing the ballroom floor and platform, from your inspection of

the ballroom, were you able to determine whether 877
or not the ballrom floor had ever been scraped and finished? A. No, I am not prepared to say that. I know it was rough, and needed scraping. It never could have been used for dancing the way it was.

Q. When was this particular item completed, approximately? A. As I recall, that was fairly late; pretty close to October.

Q. And during these many months before that, there were people constantly in and out of the building, were there not? A. Yes, but not in that section, because that was blocked off. That was a banquet section, which was not used until much 878
later.

Q. So that prospective tenants were not permitted to go into the ballroom? A. They sometimes just looked in, but it is not connected with the hotel now really; it is a separate enterprise. That is why we did some alteration on the first floor.

Q. You say it is not connected with the hotel now? A. I understand that they use it for some kind of a dancing club.

Q. But at that time, prior to 1931, it was not disassociated from the rest of the building, was it? 879
A. Yes. We had put up a partition running right across, next to the 59th Street entrance, to keep that closed, because we did not want tenants to think it was part of the lobby.

Q. Now, under "Glass replacements," 10-A, in this later schedule, you make a charge which I believe is considerably higher than the original estimate made by you back in June and July of 1931. Could that have been caused by the fact

880 that there was additional breakage? A. No; a lot of this revision was due to the fact that we had the bills, but could not find the vouchers or checks for them, so we did not include them in the original schedule, but in going over more recently we discovered additional checks, and we felt that the items should then be included in the revised schedule.

Q. Well, these checks which you are now speaking about were, then, paid before your original computation was made up in June, 1931, were they? A. Before June?

Q. Yes. A. Some of them were and some of
881 them were not. We were making payments right along in that period.

Q. But when you prepared a claim for the Prudence Company in June, 1931, you had an item for glass? A. Yes.

Q. Glass breakage, $341.56 (handing witness). Is that correct? A. That is right.

Q. Whereas, today, in Schedule A the item is $1,431.40. Now, is it not possible that a considerable amount of that addition of $1,000 was caused by breakage in the meantime? A. No; we had some difficulty in locating all these vouchers and
882 checks. They were distributed between Brooklyn, the office of the Prudence Company, and New York; and only recently a number of them were located.

Q. And you swear, then, that—or not "swear," but you are positive, then, that this $1,431 does not include any breakage after June, 1931? A. To the best of my knowledge, that is correct.

Q. Now, under Item 11-D, amount paid to Rosenthal Hardware Company for unattached

hardware left in building when taken over, $406.10; how does that item happen to arise? A. The hardware was in a room in the basement. It was hardware that we had to use in the completion of the building, but the representatives of the Rosenthal Hardware Company told us that we could not use it unless we paid for it, because they said they had not been paid for it; and I consulted Mr. Hetkin, the attorney for the Prudence Company, and was advised by him in writing that I should pay that amount. 883

Q. Were there any unopened boxes in the cellar or on the premises at all, other than this hardware that you speak of, when you first made your inspection? A. I do not recall any unopened boxes. 884

Q. You at no time saw boxes which looked like the shower-curtains? A. No, at no time.

Q. Now, under Item 27-B, an additional item under painting, which is a new item—rekalsomining 154 ceilings at $8—when was that work done? A. That was done while the general painting was going ahead. Those ceilings were discovered by us to have been stained with rust, due to the wire reenforcement of the arch or to dampness or other imperfections in the kalsomining, which made it necessary to rekalsomine them.

Q. Sometimes that rust does show through, does it not, even in the best of painting jobs? A. No, not in the best. A good painting contractor will not put kalsomine over a piece of wire that is sticking out, or where there is a rust spot on the plaster. 885

Q. Well, suppose that there is no evidence of rust when the painting is first done, is it not the fact that rust may come through later on? A. It

886 is possible. That only happens in a very comparatively few cases. It is not general.

Q. Now, the payroll of Bing & Bing's employees, Mr. Lukach, of $12,222.12; what period did that cover? A. That covered from the time I first went on the job until we left it.

Q. And when did you leave? A. I think it was either some time in the latter part of October or possibly the beginning of November.

Q. And this payroll included the salaries of whom? A. That included the salaries of—you mean the item in the schedule?

Q. $212,222.12. A. It included my own salary;
887 Mr. O'Brien, an assistant; a secretary, who was really a stenographer; a clerk or maybe two clerks in the beginning; and some laborers.

Q. What were the duties of the clerks? A. The clerks were to take care of people who came in—contractors who came into the office—to give them plans, and to get out specifications, and to run errands. They were really office boys, on a construction job.

Q. To give out what plans? A. Plans around in the building—plans of the building, and specifications.

888 Q. You mean to give them back to the original contractors? A. No; we never saw the original contractors.

Q. Were plans necessary for each contractor who did the slightest bit of work on that building? A. Usually they came down in the office to consult the plans, yes.

Q. Did they require plans for the installation of missing stools? A. No, but they required sometimes a clerk to go up and down, to point out things for them—to go through with them.

Q. And, in addition to that general item, there is an item of elevator operators. When were the elevators started in operation? A. There was one elevator working as soon as we got to the job. 889

Q. And for how long a period is this charge of $2,236 for elevator operators? A. The elevator charge, as I recall, goes right through to October 1st.

Q. From when? A. From when we first went on the job.

Q. And is that same answer to be given as to the item of porters? A. No. That same answer is not to be given there, because the item of porters was only up to—if I may refer to a sheet that I have here— 890

Q. Yes. A. (After examining paper.) The item of porters was only up to August 1st, because we felt that beyond that time it was not really chargeable to completion.

Q. And what had they been doing prior to that? A. General porter work, such as cleaning, and sweeping, removing rubbish, and loading it on trucks, and carrying heavy things around—doors, and so forth.

Q. Did you not pay an item for removing rubbish? Did you not have contractors to remove rubbish? A. Yes, but there is a difference. The item that was paid for rubbish was only for the hire of the truck. We had to get the rubbish from the building, to put it on the truck. That is so much a load for removing rubbish. 891

Q. Well, the contractors, Cox & Graham— A. They did nothing but bring the truck to the back entrance of the Essex House. We had to take the rubbish from the floors, and put it out for them.

892 Q. Now, labor in plaster patching, was that the cost of labor to a plastering contractor? Is that right? A. To both the plastering contractor, and in some cases our own laborers, who did the small plaster patching.

Q. And you would pay your laborers in addition for doing that? A. No. A separate item was kept of the amount of time expended by the laborers who did plaster patching.

Q. But the item of $436 shown as labor in plaster patching was paid to a contractor's laborers? A. To both; to a contractor's plasterers, and to our own laborers.

893 Q. And to your own laborers? A. Yes.

Q. Now, Item No. 33, Mr. Lukach, insulation of steam and incinerator ceilings; is that provided for by the original plans and specifications? A. The original heating and ventilating specification provides for the insulation of the steam-room ceiling.

Q. The original steam-fitting— A. The heating and ventilating specification which we followed at the building called for the insulation of the steam-room ceiling.

Q. And where did you get that specification? A. It was given to me when I went on the job.

894 Q. Now, the supervision fee of $6,500 for completion; that was in addition to the salary which was included in the payroll? A. That was in addition, yes.

Q. I notice in Item 18 electric current the cost of the current appreciated considerably in June, July and August. Do you know why? A. There were more people in the building at that time.

Q. When was there a rental office opened in the building, Mr. Lukach? A. I should say approxi-

mately two months after I first came. In general I mean that was the time. I am not sure of the exact date. 895

Q. Early in June, probably? A. I really cannot say that exactly.

Q. Thereafter did you notice whether people came in and out? A. Yes.

Q. Who were prospective tenants? A. They started to come in a little after June.

Q. Do you know how many tenants moved in there before October 1st? A. I have not got the exact number, no.

Q. Well, were there a few? A. Oh, no. Before October 1st? 896

Q. Yes. A. Comparatively few. The leases started October 1st, and they usually did not get in there until after that date.

Q. After October 1st was there a considerable number of tenants? A. Yes.

Q. Do you know whether any tenant was in there before October 1st? A. Offhand I don't know.

Q. Consider Item 40 on Schedule B. That is the racks and shelving—mail and key racks, file racks, etc. I will give this Plaintiff's Exhibit 85 to you (handing witness). In the rearrangement of the ground floor was provision made for the same spaces for clerks and information desk and telephone room, and so forth? 897

Mr. Judd: I object, your Honor. That is the same sort of questions that were gone into yesterday.

The Court: Sustained.

Mr. Murray: Exception.

898 Q. Where did you get, Mr. Lukach, the amount $1,650 for bronze screens omitted from lobby floor? A. I have an estimate of that amount from the contractor who did the work. It is in the original Schedule A.

Q. Did you ever know how many bronze screens that included? A. Yes.

Q. How many? A. I would like to refer to the estimate, if I may.

Q. Yes, surely.

(Mr. Judd hands witness paper.)

A. They were omitted from the space between the
899 elevator lobby and the fountain lounge and between the palm room and the lobby, and between the elevator lobby and stenographers' room.

Q. Is that three screens? Does that constitute three screens, Mr. Lukach? A. That constitutes three.

Q. Was that a lump sum, $1,650—a lump estimate for the installation of these three, or were there itemizations for each one? A. No, that was for these three. There may have been a total bid for which we did some work, but this was a total amount allocated for those screens.

Q. Who gave you that estimate? A. The Subur-
900 ban Bronze & Iron Company.

Q. They were the people who did the original bronze work, weren't they? A. I cannot recall that.

Q. Do you remember how you came to communicate with them rather than somebody else? A. I think they came around to the job and solicited the work.

Q. From whom did you get the estimate of $525 of glass for the screens? A. That was the amount that they figured for glass, too, in their estimate.

Q. The Suburban? A. Yes. 901

Q. From whom did you get the estimate $150 for racks and shelving, 40 (a)? A. That is my own estimate.

Q. That is based upon your previous experience as to what those things cost? A. That is correct.

Q. And subdivision (b) of that some item? A. The same applies to (b).

Q. And (c)? A. (c) the same thing.

Q. What would file racks and the wood screens on counters be, Mr. Lukach? A. What would what be?

Q. What are file racks and wood screens on counters? A. The plans and details show wood 902 screens approximately two feet six wide by about four feet high.

Q. What is a wood screen? A. It is something in this case that the architect had in mind standing on the counter so that it would conceal a cashier or somebody behind the counter who was doing something that they would not want the guests to see.

Q. Subdivision (d), whose estimate was that? A. That is my estimate, too.

Q. Did you communicate with the Telephone Company? A. I did not communicate with the Telephone Company. 903

Q. Do you know whether the Telephone Company instals telephone booths free of charge? A. I do not know whether they do or not.

Q. Is there a telephone room in the building now? A. I don't think there is a regular telephone room. There is a space where they have a booth, if I am not mistaken. But no particular telephone room.

904 Q. Is there a telephone operator there? A. There is the main telephone operator. Oh, you mean the main switchboard. That was on the second floor. There is a main swithboard telephone room.

Q. But this telephone room was not a room for the main switchboard operator, it was a telephone room where people might go to make calls? A. Which are you referring to, this item here or the second floor that I mentioned?

Q. I am referring now to item (d). A. Item (d) showed on the plans private telephones that the people on the ground floor could go in and
905 drop their nickels and use the phones.

Q. Whose estimate is the $1,158 for item (e)? A. That is an estimate of mine based on the unit price given me by the manufacturer for folding wood doors.

Q. Item 2, Kellastone carpet strips. Who figured the lineal feet originally? A. Originally it was computed by the Kellastone people.

Q. And subsequently it was determined that the lineal feet measurement was high? A. We subsequently had it checked by somebody else, and since his lineal footage was less we used the smaller of the two figures.

906 Q. Whose estimate is the cost of six and a half cents? A. The estimate of the Kellastone people.

Q. Kellastone carpet strips were not put in at all at any time? A. No.

Q. They were not put in by you? A. No.

Q. What system was used for keeping the carpet down? A. We drilled a series of holes around the perimeter of the room, in the cement, and plugged them with wood.

Q. And many people use that instead of strips; isn't that so? 907

Mr. Judd: I object, your Honor.
The Court: Sustained.
Mr. Murray: Exception.

Q. Whose is the estimate for wood stools and aprons? A. That is my estimate.

Q. In 2 (c), Mr. Lukach, you say wood flooring omitted in private dining room, $800. Are you sure that the wood flooring was omitted in the private dining rooms? A. I am not positive on that point. That item was in Mr. Grad's schedule.

Q. You were there before Mr. Grad, weren't you? 908 A. I was.

Q. And the space for the private dining rooms was there at that time? A. They were.

Q. Can you go back now and remember whether or not there was flooring in the private dining rooms? A. No, I can't remember that item.

Q. What was Mr. Grad's duty; was it to compare the specifications with the work to see in what respects the specifications were not complied with, or was it his duty to go through the building and see, as you had seen, its exact condition? A. He made a check-up of the building to find out how the construction items as done deviated and differed from those originally specified and planned. 909

Q. Are these private dining rooms still in existence? A. No.

Q. At any rate, at the time of your inspection, Mr. Lukach, you made no mention of the fact in your report that wood flooring was not in private dining rooms? A. I do not think I—I did not make mention of that item.

Q. Whose estimate of $800 is this? A. This is an estimate of Mr. Zilber.

910 Q. Item 3, cement base. Whose estimate is that? A. Mr. Zilber.

Q. Did you estimate the cost of wood flooring for private dining rooms? A. No, that was Mr. Zilber's estimate.

Mr. Murray: Well, I understood that Mr. Lukach—Mr. Lukach's testimony was, or it was to be taken or assumed, that Mr. Lukach was stating what the reasonable value of these items was.

Mr. Schenck: That is true, but he has based some of the items—the figures are arrived at directly on his figuring on his bids and on his
911 estimates, and in other cases the figure has been arrived at by Mr. Zilber whom we have here, and Mr. Lukach in conference with him has approved, and we are for the purpose of shortening the matter reserving Mr. Zilber for rebuttal.

Q. Then your estimate, if you made any estimate, Mr. Lukach, of either the private dining room flooring or the omission of sanitary cove, is based on what Mr. Zilber told you? A. No, he put a price on it and I figured it out and agreed that that was a fair price based on my judgment.

912 Q. Then is this item of $800 your estimate of the cost of doing this work? A. It is Mr. Zilber's estimate, with myself coinciding.

Q. What is a sanitary cove? A. A sanitary cove is a quarter round section of a cement base, to make it easy to take the dirt out so it does not accumulate.

Q. It comes out from the wall somewhat? A. No, it does not come out from the wall. If you want I can draw it for you.

Q. Yes. A. (Witness draws on blackboard.) 913

Mr. Judd: We can show it to you on the plans.

The Witness: Yes, it is a section of the plans.

A. (Continuing.) The ordinary base would be like that, but a sanitary cove base would have this little quarter round section, so as to make it easier to clean.

Q. Would that interfere with the carpet going close up against the wall? A. If it were in the rooms where the carpet was to be placed it might interfere with it. 914

Q. Whose is the estimate of closets omitted from servants' rooms? A. That is an estimate of Mr. Zilber and myself.

Q. Do you know where the barber shop is in the building now? A. Yes.

Q. Or where it was after completion? A. Yes.

Q. Where is it? A. It is to the west of the 50th Street entrance at present.

Q. Is that the same spot for which it was originally planned? A. No.

Q. Item 22, medicine cabinets. Are you responsible for this language, Mr. Lukach? Or is this your language: "Difference between amount actually spent and amount called for in specifications as medicine cabinet expense"? 915 A. Yes, that is my language.

Q. You had examined the specifications in that regard? A. I had.

Q. And the medicine cabinet allowance provided for was what? A. $10,000.

Q. How did you find out what was actually spent? A. It is on a requisition.

916 Mr. Schenck: I think I should object, if your Honor please, as to Item 22. Mr. Murray stated on the record: "We admit that what was paid for the medicine cabinets was not the amount that was stated in the original specifications as allowance for medicine cabinets, and that the difference is the amount stated."

Mr. Murray: All right, I am not contesting that.

The Court: Then why waste time with that?

Mr. Murray: I mean I am not contesting the actual amount. I am trying to find out
917 how he learned these things, learned this estimated difference.

Q. This amount was put in solely because of the $10,000 which appeared in the original specifications? A. Yes.

Q. The difference between the amount actually spent by Prudence Company to complete painting and the amount which would have been required to comply with the plans and specifications as shown by contract with Landsman Bros. & Soffin, $19,150. There was no provision in the specifications, was there, Mr. Lukach, that any specific
918 amount of money should be spent on painting? A. No.

Q. And if a proper painting job were done it would be immaterial whether it were $90,000 or $50,000? A. If the painting had followed the specifications.

Q. Yes. A. Of course.

Q. You say that you have completed a painting job up there; haven't you? A. We have completed the painting job.

Q. Have you a record, Mr. Lukach, there which you could give me of that part of the specifications which calls for liquid soap dispenser system? A. Yes, I think so. The plumbing specification, page 40. 919

Q. Do you refer to a particular specification which is here in court? A. Yes.

Mr. Murray: I might say, your Honor, that this is one of the specifications which Mr. Grad identified yesterday as one which he brought to The Prudence Company at the time he brought this bond volume of specifications.

920

The Court: Yes.

Mr. Murray: There has been no evidence yet that this is one of the specifications upon which this loan was granted; no proof yet that this is one of the specifications that was approved at the time of the granting of the loan.

Mr. Schenck: I would draw a different conclusion from the evidence, inasmuch as Mr. Grad identified that as a specification prepared by Frank Grad, Architect, which he delivered at the same time that he delivered Exhibit No. 4.

921

The Court: In your proofs you prove the making of the contract and as to the sufficiency of the specifications. I had assumed then that that was the subject matter of the building agreement. There was nothing at that time said about any other specifications, and the matter arose only as the result of some cross examination, one question being directed to Mr. Grad. Do you regard this—referring to the specification Exhibit No. 4—

922 as specifying a possible construction? Then it developed that these various items were omitted—plumbing, heating, electrical work and other things that he classified as mechanical, I suppose in contradistinction from structural. But the mere fact that he delivered these things to some official of The Prudence Company at the time that something else was delivered is not sufficient to make this other delivery part of the contract.

Mr. Schenck: The specifications are made a part of the building contract by recital in the building contract, the recital being on
923 plans and specifications of Frank Grad, Architect; and it was through an oversight on my part that when I was handing the specifications to Mr. Braislin I did not hand him this second blue printed set.

The Court: I think there is not enough in what Mr. Grad said to warrant me finding that these other specifications were part of the contract, and it would seem to me desirable for you to recall Mr. Braislin or some other officer so that the matter may be proved if it is necessary for your purposes.

924 Mr. Schenck: Yes, sir. I shall take advantage of that, your Honor.

Q. Item 32, Mr. Lukach. What does that mean, "Amount demanded by Fordham Cornice Works to furnish guarantee called for by specifications"? A. The specification called for the roofing contractor to guarantee the roof over a period of years against leaking, and speaking to the contractor, the Fordham Cornice Works, he said that he did not furnish a guarantee because that would

require a better quality of material used, and 925
that if we wanted the guarantee as called for in the specification he would have to pay him the additional sum of $500.

Q. Did he show you his original contract with the Central Park Properties? A. No, I did not see the original contract.

Q. Item 33, subdivision (d). That is in reference to the radiators for interior bathrooms? A. Yes.

Q. In your investigation of the interior bathrooms, Mr. Lukach, did you find any electric outlet which would have permited the use of an electric heater in the bathrooms? A. I did. 926

Q. Item 35, subdivision (b). When was this change as respects terra cotta on the facade discovered? A. It was discovered after I had made my original survey.

Q. You testified, I think, that prior to making your investigation and inspection you had examined the plans and specifications in detail so that you would familiarize yourself with the requirements thereof. A. That is correct.

Q. Just when was this discovered, do you know? A. I imagine it was discovered when Mr. Grad went through the building and consulted 927
his plans and specifications.

Q. Then it was Mr. Grad rather than you who discovered this; is that it? A. Mr. Grad called that to my attention.

Redirect examination by Mr. Judd.

Q. Mr. Lukach, while the alterations which you spoke of making in the Essex House were going on did you stop the work of completion? A. I did not.

928 Q. The two were going along pari passu? A. They were.

Q. Will you tell us what the condition of the elevators was when you entered the building? A. A final check-up inspection had not been made of the control panels, motors, the overhead machinery, and the signal equipment was not in working order.

Q. What was required in order to put the elevators in working order? A. It required the services of the Otis Elevator Company.

Q. And how much did you have to pay them in order to have the equipment completed?

929. Mr. Murray: I object to that question.

The Court: How is this redirect examination? It has been all covered in Schedule A, hasn't it?

Mr. Judd: There has been an attempt to show that the payment covered something besides the completion of the elevators.

The Court: I see.

Mr. Murray: He has testified about that.

The Court: I overrule the objection.

Mr. Murray: Exception.

A. $14,500.

930 Q. Had the Otis Elevator Company filed a conditional bill of sale against the premises? A. I was not sure of that point.

Q. In connection with the painting contract, Mr. Lukach, was there any painting done where the panel moulding had been removed, beyond the ordinary wall painting, which was not covered in the $5,000 additional item? A. No.

Q. Concerning which you have testified? A. No.

GORDON S. BRAISLIN, recalled by the Plaintiff, testified as follows: 931

Direct examination by Mr. Schenck.

Q. Mr. Braislin, at the beginning of the trial I showed you a certain bound volume which has been marked Plaintiff's Exhibit 4 (handing witness), and you testified, as I remember it, that that was submitted to you before the building loan was made and was the specification referred to in the building loan agreement on which the loan was made. A. Yes.

Q. I show you Plaintiff's Exhibits Nos. 98, 99, 100, 101 and 102, and ask you if those documents 932
(handing witness) were submitted to you at the same time as Plaintiff's Exhibit No. 4 and equally with Plaintiff's Exhibit No. 4 constitute the specifications on which the building loan was made? A. Yes.

Cross examination by Mr. Murray.

Q. Mr. Braislin, I understood you to testify on direct examination the other day that the loan had not been arranged by you. Is that correct? A. That is correct.

Q. Do you claim now that these or any specifications were submitted to you personally? A. These 933
are the specifications that were sent to me by the New York office at the time the loan was signed up, as being the specifications referred to in the letter of acceptance.

Q. The building loan agreement provided, did it not, that the plans and specifications should be initiated by the lender and the borrower? A. Without checking it I cannot tell you.

934 Q. I refer you to Paragraph Seventeenth of the building loan agreement, and ask you whether that is so (handing witness)? A. No, it says, "and amendments thereto made by the lender in a memorandum dated September 24, 1929, and initialled by the lender and the borrower." That memorandum has been submitted in evidence.

Q. Doesn't initialing apply to all these plans and specifications? A. No, I don't take it so. That memorandum, if you will recall, was initialled by Mr. Haas and Mr. Bigelow.

Q. I understand, but you say there is no requirement in that agreement for the initialing of
935 the plans and specifications? A. I don't take it so, no.

Q. Is there any initial on these specifications?

Mr. Schenck: You refer to what exhibits?

Mr. Murray: Referring to the mechanical specifications.

A. I did not see any.

Q. Is there any initial on these specifications?

Mr. Schenck: Referring to Plaintiff's Exhibit No. 4.

A. Not that I noticed.

936 Q. (Mr. Murray hands witness exhibit.) A. I do not see any initials, no. But there are initials on the memorandum which is referred to in that building loan agreement and which is in evidence.

Q. Where were these specifications obtained from before trial? A. From our Engineering Department. They have been there all the time.

Q. Did you get them from the Engineering Department? A. They were given to me by the Engineering Department.

Mr. Schenck: The plaintiff rests.

937 Mr. Murray: If your Honor please, I move to dismiss the complaint upon the ground that the plaintiff has failed to establish any damages. I move to dismiss upon the ground that the evidence establishes that prior to December 16, 1930, The Prudence Company had reserved $75,000 for the completion of the work after an agreement between The Prudence Company and the principal on the bond, that that $75,000 would have been sufficient to complete the job.

The Court: The motion is denied.

938 Mr. Murray: I move to dismiss the complaint insofar as it seeks to recover for any electric current under Item 18 of Schedule A supplied after March 17, 1931, the date upon which the plaintiff became the owner of the property, and move to dismiss as to the item of insurance under No. (7) in Schedule A, or any insurance after March 17, 1931. And I move to dismiss as to the payroll Item 41 of Schedule A or any payroll paid after March 17, 1931.

939 I move to dismiss as to steam consumption, Item 34 of Schedule A, as to any steam consumed after March 17, 1931. I move to dismiss as to Item (4) of Schedule A or any part of the supervision fee which applied to the period after March 17, 1931. I move to dismiss as to No. (5) of Schedule A or any part of the first half taxes of 1931, after March 17, 1931. I move to dismiss as to Item (5) of Schedule A, as to any part of said taxes. I move to dismiss as to Item 24 of

940 Schedule A, or any telephone charges after March 17, 1931.

The Court: I will deny the motion.

Mr. Murray: I move generally to dismiss as to any of the items which I have just previously enumerated, for the period after January 6, 1931, that being the date upon which Mr. Braislin said The Prudence Company went into possession.

The Court: I deny the motion.

Mr. Murray: Exception. At this time, your Honor—I do not think it is ever necessary to offer in evidence a pleading in the

941 action—

The Court: Yes, it is. If you want to use it as evidence it has to be offered as an exhibit.

Mr. Murray: Then I shall offer in evidence Paragraph XXXIX of the complaint, which gives the facts as to the foreclosure of the mortgage and the sale upon said foreclosure.

The Court: That will be received.

Mr. Murray: It won't be necessary to mark it, will it, your Honor?

942 The Court: No.

DEFENDANTS' CASE.

943

PHILIP H. GLADSTONE, called as a witness in behalf of the Defendants, being first duly sworn, testified as follows:

Direct examination by Mr. Murray.

Q. Mr. Gladstone, what is your business? A. Painting and decorating contractor.

Q. In or about the year 1930 with what concern were you connected? A. Globe Painting and Decorating Company, Inc.; vice-president and general manager.

Q. Was it your firm which had the contract for the painting of the premises on 59th Street now known as the Essex House? A. Yes. 944

Q. Will you state how you came to make the contract and what the contract called for, and what you did under that contract? A. On or about May 28, 1930, we were requested by the Central Park Properties, Inc., to submit an estimate for the painting and decorating of the property known as Central Park Properties, 160 West 59th Street, and we submitted an estimate on May 28, 1930.

Q. Was that estimate based on some facts which had been submitted to you? A. This estimate was based on furnishing labor and material necessary to do the painting in accordance with the plans and painting specifications. 945

Q. What estimate did you give? A. $81,494.

Q. Was that estimate based upon the plans and specifications? A. This estimate was based upon the plans and specifications.

Q. Did you thereafter enter into a contract with Central Park Properties for the doing of painting work? A. We did.

946 Q. Have you a copy of that contract? A. I have (handing counsel).

Mr. Murray: I offer it in evidence.

(Marked Defendants' Exhibit J.)

Mr. Murray: It just occurred to me, your Honor, that there might be some confusion as to the question of the damages sustained by the plaintiff arising out of the foreclosure. My impression of it was that the plaintiff was relying now for damages entirely upon Schedules A and B as revised. Under the circumstances I think I should move to dismiss the
947 complaint as to any other items of damage than those items stated in Schedules A and B.

I move to dismiss the second cause of action, your Honor, stated in the complaint.

(Colloquy of Court and counsel omitted.)

The Court: I see nothing to do except to grant the motion, and that I shall do.

Mr. Schenck: I shall take no exception, and I shall take whatever advantage I can from the motion, on the limitation to the issues as formulated by the first cause of action.

948 The Court: The motion to dismiss the second cause of action is granted.

Q. I show you Defendants' Exhibit J, Mr. Gladstone (handing witness), and ask you to briefly state what the contract was that you made with the Central Park Properties for painting? A. The contract was for all painting work on the premises known as 155-165 West 58th Street, 160-170 West 59th Street, in accordance with and agreeable to the plans and specifications.

Q. Were there any alternates in that contract? 949
A. There were. There was Alternate No. 1: should the owner decide to omit the final coat of paint from all tenants' quarters of the building herein mentioned the contractor agrees to allow the owner to deduct the sum of $10,321 from the amount due him under this contract. This is Alternate No. 2: Should the owner decide to omit the final coat of paint from the public and service corridors and the servants' rooms of the building herein mentioned the contractor agrees to allow the owner to deduct the sum of $2,264. Alternate No. 3: Should the owner require this contractor to paint the cement floors and base in the ser- 950
vants' rooms, stairways, service corridors and rooms of the said building herein mentioned, the owner agrees to pay the contractor the additional sum of $1,273. Alternate No. 4: Should the owner require the contractor to grain the passenger elevator bucks similar in all respects to the graining on the elevator doors, and which graining on the bucks herein mentioned must meet with the approval of the owner, then the owner agrees to pay the contractor an additional sum of $220.

Q. Did you do all the work called for by the contract, Mr. Gladstone? A. Yes.

Q. And that constituted the painting of all the 951
portions of the premises to be painted except the final coat of paint? A. The exterior had the final coats of paint on and were included in the contract. The interior had all the ceilings completed, sized and calcimined. The walls had the zinc sulphate wash, the first coat of prime, sparkling, and the second coat of paint, and all the interior trim such as doors, windows, bucks, ironworks, etc., had the coat of paint.

952 Q. The final coat of paint, Mr. Gladstone, was not put on the walls of this building by you? A. No.

Q. And you had left that out as one of the alternates for which you were allowed the sum of $10,300; is that right? A. That is right.

Q. Under the terms of your contract did you agree to go back at any time to paint that final coat for the sum of $10,300? A. May I look at the contract?

Q. (Mr. Murray hands witness paper.) A. Well, in accordance with this contract we were supposed to have put on the third coat of paint,
953 but the owner had an option to omit it during the life of the contract.

Q. And if he omitted it the contract price was to be less by $10,300; is that it? A. $10,320, in the tenants' quarters, and $2,264 in the service quarters. There were, of course, unit prices in our contract which took into consideration the possibility of additions and omissions.

Q. When was the last work performed by you on the building? A. I have a weekly report ending 12/3/30, but we were on there probably another week or two after that.

Q. So that you were on the job until about De-
954 cember 10th or 17th; is that correct? A. Approximately.

Q. And when you left the job there still remained to be done the final coat of paint? A. That is right. On the interior.

Q. On the interior, and you had not contracted to do that? A. We had not. We had contracted for it, but the owner took advantage of the clause in the contract which omitted it.

Q. What kind of material did you use in the performance of that painting job so far as quality

was concerned? A. As far as quality, it was first- 955
class material, required by the specifications.

Q. Did you see the workmanship which went into the application of that material to the walls? A. Yes, I was there practically every day.

Q. What was that workmanship so far as quality was conerned? A. First-class. Executed by skilled Union mechanics who had been in our employ anywhere from fifteen to eighteen years.

Q. How long had you been in the painting and decorating business, Mr. Gladstone? A. Since 1919.

Q. After that date, or in December, was there any subsequent time when you were particularly 956
in contact with the building again, in any manner? A. I was requested by Mr. Billsborrow, I think is the name, of The Prudence Company, to submit an estimate.

Q. An estimate of— A. Some time in February, of 1931, which we did.

Q. Have you got a copy of the letter requesting that estimate? A. No, I have a copy of our estimate.

Q. Do you know the form in which the request came to you from Mr. Billsborrow? A. I think it was a telephone call to our office.

Q. Had you ever talked with Mr. Billsborrow 957
over the telephone before? A. Regarding this estimate or—

Q. Regarding anything? A. Well, I have spoken to Mr. Billsborrow on two or three occasions before that, in reference to other work they were doing, and we tried to solicit.

Q. Did Mr. Billsborrow or not speak with you over the telephone when an estimate was requested, Mr. Gladstone? A. I spoke to Mr. Bills-

958 borrow with regard to the estimate that we submitted.

Q. Did you later on submit an estimate to anybody connected with The Prudence Company or to The Prudence Company itself? A. We submitted an estimate to The Prudence Company on February 18, 1931.

Q. Have you got a copy of that estimate? A. I have.

Q. May I see it? A. (Witness hands Mr. Murray.)

Q. Did you go to the building at any time in February, 1931? A. Yes.

959 Q. And what did you do while you were there? A. Made a general survey again of the conditions on the building as regards the paint.

Q. And after that investigation did you make ~~an~~ estimate to The Prudence Company? A. We did.

Q. Well, later on did you have any communication from Mr. Lukach? A. I did, and our office had a telephone request to call to see Mr. Lukach.

Q. Did you have any direct communication yourself with Mr. Lukach? A. I visited Mr. Lukach on the premises.

960 Q. Did Mr. Lukach ask you to do anything at that time when you saw him? A. He asked me to submit an estimate for painting work on the premises.

Q. And in accordance with that request, did you submit an estimate? A. Yes.

Q. Is this the estimate which you submitted to ~~Mr.~~ Lukach (handing witness)? A. Yes.

Mr. Murray: I offer that in evidence.

(Marked Defendants' Exhibit K.)

Mr. Murray: This is an estimate, your Honor, to furnish labor and material for $69,800, with various alternate estimates included therein. 961

The Court: What is the date?

Mr. Murray: April 8th, 1931.

Q. Now, what were these alternates which are mentioned in that estimate (handing witness)? A. Well, we have them only by number—alternate one, two, three, four and five, which were part of a painting specification which was submitted to us to guide us in making up our estimate.

Mr. Murray: Have you a copy of the painting specification? 962

Mr. Schenck: No; it is in the contract.

Q. I show you now Defendants' Exhibit J, and appearing in there are addenda to painting specification, and I ask you whether the alternates mentioned in your estimate are the alternates which are mentioned in that instrument (handing witness)? It is the last page, I understand. A. Yes; I am just looking through this. (After examining paper.) Alternate No. 1 refers to the ceilings—

The Court: The question is whether the alternates referred to in this estimate of yours are the alternates in this Exhibit J? 963

The Witness: (After further examining paper.) Yes, alternates Nos. 1 and 2 of our estimate are intended to refer to alternates Nos. 1 and 2 in this specification.

Q. And are they the same as alternates 1 and 2 of this specification? A. Yes.

Q. Now, what work did this estimate of yours cover—the estimate shown in your letter of April

964 8, 1931, Defendants' Exhibit K? A. It included the painting as required by that specification, which I notice, in a communication to Mr. Lukach in answer to an inquiry, included the following work:

"For your information, we are listing the costs of work required by the new specifications, which was not included in the previous specification:

"Sparkling and papering required because of the wall molding being removed, $5,900.

"Additional coat of paint on walls, $9,500.

965 "Additional coat of paint on trim, $10,000.

"Papering corridors, $5,000.

"Cement floor painting, $2,000.

"Lettering, $1,000.

"These items were included in our estimate of the 8th, totalling $69,800."

Now, do any of these or were any of these items items which had already been done by you originally? A. No.

Q. This was in addition to what you had already done under your previous contract? A. Yes.

966 Q. You mentioned there an additional coat on trim. Is that right? A. Additional coat of paint on trim, yes, $10,000.

Q. Now, had you during your previous work put the final coat on the trim? A. No.

Q. You had not? A. No.

Q. What is the "trim"? A. The trim is the iron bucks, the doors, the inside of windows, spare iron work, picture moldings, and so forth.

Q. How many coats of paint were called for by the request of Mr. Lukach for estimates? A. Well, I would have to refer to that specification.

Q. (Handing witness paper.) A. On the kala- 967
mein and the hollow metal doors and steel bucks this specification required one coat of lead and oil paint, and a final coat of enamel.

On the radiator enclosures, which, of course, we take in as trim, this specification required one coat of lead and oil paint, and one coat of enamel.

On the metal windows—metal window-frames, sash, and stools, they were to be painted on the inside with one coat of lead and oil and one coat of enamel.

On the ornamental miscellaneous iron, the exterior of steel casement doors and windows, exposed pipes in closets, and all elevator door- 968
saddles above first floor; and then a number of other items to be painted with two coats of lead and oil paint.

Q. I understand you to have testified, Mr. Gladstone, that all except the final coat of paint had been placed on this job—all except the final coat? A. Generally, yes.

Q. Now, how much would it have cost to put on the final coat in accordance with the specifications? A. The allowance that we had in our contract would have covered it—a total of about $12,000-odd. 969

Q. But if you had been called in independently, instead of in accordance with the contract with the Central Park Properties, would the cost have been the same or a little higher or a little lower? A. The cost would have been the same.

Q. Now, do you know whether or not there is any custom in the City of New York regarding the reserving of the last or final coat of paint in apartments until some period later than the doing of the first coats of paint?

970 Mr. Schenck: I object to this on the ground that it is irrevelant, your Honor.

The Court: I sustain the objection.

Mr. Murray: Exception.

Q. Let me see that, now. A. Yes (handing counsel).

Q. In your talks with Mr. Lukach, did he make any observation or complaint to you that the job which you had done was not a first quality job? A. He did not.

Mr. Schenck: I object to that on the ground—

971 The Court: Sustained.

Q. Did he complain that the job which you had done was not in accordance with the specifications? A. He did not.

Mr. Schenck: I object to that.

The Court: Sustained.

Mr. Murray: Exception. That is all, Mr. Gladstone.

Cross examination by Mr. Schenck.

Q. Mr. Gladstone, I did not quite catch your reference to the 3rd of December. I think you
972 stated that the 3rd of December was the last day on which you had any record of any work being done under your contract? A. That is right.

Q. And what, speaking very generally, was that record? Was it your daily progress report or something of that kind? A. That particular one was a weekly summary of work completed.

Q. Yes? A. Up until that particular period.

Q. When did you start this painting job, Mr. Gladstone? A. July 11, 1930.

Q. I note by the contract which has been offered in evidence that your payment was to be 50 per cent. cash, and 50 per cent. in four months notes —all renewal notes to bear interest, and all notes to bear the endorsement of A. E. Lefcourt. Did you receive 50 per cent. cash on the execution of the contract? A. We received our moneys in accordance with the contract regularly. They were progress payments. 973

Q. But I ask did you receive 50 per cent. cash on the execution of the contract? A. Did we get all our payments, do you mean?

Q. No. I am asking you whether you received 50 per cent. cash on the execution of the contract? A. Well, I have here a statement of December 31, 1930, which shows that we received on account cash and notes $36,000. That is— 974

The Court (Interposing): The question is: when you signed the contract did you get 50 per cent. of the contract price in cash?

The Witness: At the time of the signing of the contract, your Honor?

The Court: Yes.

The Witness: No.

Q. And the statement of what you did receive is a statement that you received part of your payment in notes? A. That is right. 975

Q. And how much in notes? A. There is a total here of $36,000, and that is 50 per cent. in notes— $18,000 notes, and $18,000 cash.

Q. And when did you receive the notes—the date of the notes? A. Well, at the same time we received the check payments—cash payments— they were progress payments, and I do not recall whether it was once a month or once every two months as the work progressed.

976 Q. Does that statement that you have in your hand now show the details as to times and amounts of payment? A. No; it is just a statement made as of December 31.

Q. And for what purpose was that statement made? A. This was submitted to the Central Park Properties, showing the standing of the account at that particular date.

Q. May I see that? A. Yes, sure (handing counsel).

Q. So that on the 31st of December, 1930, according to this statement, there was a balance due to you of $8,832? A. On the open account, yes.

977 Q. Well, when you say "on the open account" you mean on this particular contract? A. What I really mean is this: that there was $8,800 due us, but there were a lot of notes that were not as yet or had not as yet matured.

Q. What was the purpose, if you had notes which had not yet matured, of your rendering a financial statement to Central Park Properties? A. Oh, we do that every month.

Q. And you have no record there to show when you received these notes or what their term of maturity was? A. No, I have not, not here.

978 Q. But so far as the payments under this contract were concerned, the payments were made on the due dates, and in accordance with the contract? A. On the due dates and in accordance with the contract, yes.

Q. And so you received your full payment under this contract? A. No, sir.

Q. That is, the notes on maturity were not met? A. The notes and the balance of the open account was never met—a total of some $24,000 or $25,000.

Q. I see. Now, I am awfully stupid on these figures and financial things, among others; but I

understood you to say that everything was met except the open account, and that the open account was in notes? A. No. I think what I said was that we had received on account in cash and notes up to this date $36,000, of which $18,000 were notes, and $18,000 was cash. Our total indebtedness up to that date was $44,832.50, which was due us on that date; so that there still remained a balance of $8,832 due on that date, which we did not receive. That is, of course, in addition to the $18,000 payment of notes, totalling about $26,000-odd. I don't know whether we got $3,000 of that. 979

Q. But you have no daily reports of any work done under this contract between the 3rd of December and the 10th of December, when you say the last work was done? A. I will tell you: I have these reports here. I have never looked them over; that is, I have never looked them over since the completion of the job; and if you will just give me a moment, I will see whether we have any. (After examining papers.) I have here a location report, as we call it, of December 4, 1930, showing the number of men on the job on that particular date. 980

Q. How many men? A. And where they were working; and also one of the 5th of December and their locations. 981

Q. And now many on each of those dates? A. On the 4th there were 21 men.

Q. And how many on the fifth? A. On the 5th we had eight men. There may be some more sheets here. I don't know.

Q. I do not want to take too much time about it, but I am a little interested about the course of your job from the 5th on. By the way, did you

982 know anything about a building loan that the Prudence Company was making to the Central Park Properties? A. No, sir, I had no knowledge of that.

Q. Was any money due you on the 5th of December? A. Oh, yes.

Q. And were you pressing the Central Park Properties for payment? A. We were insisting upon getting our payments when they were due.

Q. Did you know that Central Park Properties had received some $300,000 on the 5th of December? A. We did not know that, no.

Q. Now, I understand you to say that your esti-
983 mate of putting a final coat of paint on this job was about $12,000? A. That was the allowance in our contract for the omission—

Q. No. I think you said that in answer to Mr. Murray's question. A. That the application of the final coat of paint would cost around—whatever it was—$12,000-odd, in accordance with the allowance that we made in our original contract.

Q. But when you examined the building for the purpose of making your estimate to Mr. Lukach, of course you realized that it was in such a state that a final coat of paint would not be adequate, did you not? A. No.

984 Q. I show you this letter of the 11th of April, 1931, and ask you if you wrote that letter to Mr. Lukach (handing witness)? A. Yes; I have a copy of it right here. That is right.

Mr. Schenck: I offer that in evidence (handing paper to Mr. Murray.)

(Marked Plaintiff's Exhibit No. 107.)

Q. Have you got the painting specifications that were the basis of your original contract? A. Yes.

Q. If you will point out to me—you said on direct examination that your contract called for sizing and kalsomining the ceilings in accordance with the specifications. Will you point out to me upon that specification that you have there, the provision which called for kalsomining and sizing the ceilings? A. It is addenda No. 2 to the painting specification. 985

Q. Is there any date to that addenda? A. I am looking for it now. There is no date on it, no. Paragraph 6 says "Ceiling shall be given one coat of gum size, and one coat of kalsomine, instead of being painted as described."

Q. May I see that a moment, please? A. Yes (handing paper to Mr. Schenck). 986

Q. Can you tell me what this yellow letter is, which has Central Park Properties, with some initial, which I can not make out—and "7/9/30"—can you tell us what those initials are? A. I really don't know. It is Chinese to me.

Q. You also said something—you made some reference in your direct examination in regard to unit prices which were the basis of your estimate. What were those unit prices? Are they referred to in your contract? A. There is a list of unit prices in the contract, yes.

Q. Will you please state those? A. Units and prices are as follows: 987

1. Three coats of lead and oil, per square foot—and there is a column for "Addition" and a column for "Deduction". The first item is an addition of .0375 cents; deduction .0325 cents.

Now Item 2: Two coats lead and oil, per square foot: addition two and three-quarter cents, deduction two and three-eighth cents.

988 3. One coat of size, and two coats of flat wall paint, the last coat stippled, per square foot, three and one-half cents addition; three cents deduction.

4. One coat of size and two coats of flat wall paint without stippling, per square foot, three cents addition; two and three-quarter cents deduction.

5. One coat of size and two coats of lead and oil paint, per square foot—

Q. (Interposing.) Are there many of these? A. There are sixteen different items.

989

Mr. Schenck: All right. I do not want all of those read. Here is your financial statement (handing witness). That is all.

Redirect examination by Mr. Murray.

Q. This letter of April 13, 1931, Plaintiff's Exhibit No. 107, Mr. Gladstone, in which you refer to the adhesive qualities of the paint surface of the plaster, and mention the application of a treatment that will cause the finishing cost of paint to adhere properly, what is that treatment which is applied in such cases? A. It is a size coat.

990 Q. A size coat? A. Yes.

Q. And what does that consist of? A. Well, there is usually a glue size—glue and water.

Q. And how much would it cost for the application of that size treatment to that job? A. To that particular job?

Q. To that particular job? A. Roughly, I would say about $1,200.

Mr. Murray: That is all.

Mr. Schenck: That is all.

HENRY SWITZER, called as a witness on behalf of the defendants, being first duly sworn, testified as follows: 991

Direct examination by Mr. Murray.

Q. Mr. Switzer, what is your business? A. General estimator and superintendent.

Q. And with whom were you connected in 1931? A. With Edward V. Keeler, Inc.

Q. And are you the gentleman who went from Keeler, Inc. to this job at 59th Street? A. I was.

Q. And are you the gentleman who saw Mr. Lukach there? A. I did.

Q. Will you describe what dealings you had with Mr. Lukach, and what you did in respect of that job? A. I saw Mr. Lukach, and told him my mission, and requested a set of plans and specifications, to make a detailed estimate as to the cost of finishing this building. 992

Q. Did you have before you at that time any information from the Prudence Company as to incompletions? A. I did not. I got the data of what had to be done in the building for completion only about four or five days later.

Q. And who sent them to you? A. I received them from Mr. Lukach.

Q. And did you thereafter examine the building with these claimed incompletion items before you? A. I did. 993

Q. And at the time you made your inspection had some of the claimed incomplete items been completed? Had some of the work been done? A. A good deal of it was done when I stepped in.

Q. In other words, at the time you were there Mr. Lukach told you of certain items which had been done? A. He did.

994 Q. And about when was it that you went there first? A. May 25, 1931.

Q. Did he, Mr. Lukach, show you any contracts which assumed to have covered certain work done there? A. No, I am not particular. A few questions arose, and he proved what it was.

Q. Now, when you were there was your attention called by Mr. Lukach to any missing stools or trim? A. I was told by Mr. Lukach that a certain number of stools were missing at the time, but when I got into the building they were all on —and I was told the number of the same.

995 Q. In other words, certain stools were claimed to have been put on? A. Yes, sir.

Q. Did you see the elevators? A. I went up and down with them.

Q. Were they operating, in your opinion, satisfactorily? A. They were, and the men—I presume they were Otis men—were working on them, to ease them up and regulate them, as is usually done.

Q. Did you examine the elevator pits for water? A. I did not.

Q. Do you recall whether there was any claim at that time that the elevator pits needed to be water-

996 proofed? A. I was so informed by Mr. Lukach, yes.

Q. But you did not go down to the pits? A. No, I did not.

Q. Now, do you know whether the waterproofing had been done at that time? A. I simply took Mr. Lukach's word.

Q. Did you examine the painting? A. The painting? What do you mean by "examine the painting"?

Q. Did you examine what painting had been done in the building, to determine how much had been done? A. I went through every room in the house, from top to bottom, and saw the painting was in good condition, ready for a final coat, excepting some of the rooms where the wall moldings, the panelling, had been taken out, and that looked out of place, because of all the spots and patching and so on. 997

Q. How long has your experience been, Mr. Switzer, in connection with building construction? A. My experience?

Q. Yes. A. Thirty-five years.

Q. And during that time have you had occasion to examine and to apply paint? A. I never applied paint myself, but painters were under my supervision. 998

Q. From your examination of the walls could you tell how many coats of paint had already been placed on there? A. I could see there was two coats on there.

Q. Was there anything about the appearance of those coats of paint—I will withdraw that. From your examination of the walls, could you determine whether or not the paint that was applied had been first quality paint? A. The paint looked good to me. I don't know the analysis of the substance of the paint. 999

Q. And applying the same quality of paint as a third coat to those walls, how much would you say the reasonable cost thereof would be? A. Governing myself according to the contract of the painter, I should say between $12,000 and $15,000.

The Court: The contract of what painter?

The Witness: The painter that had the job—the Globe.

1000 Q. Did you see, Mr. Switzer, any cement floors in the building which required levelling? A. I could not say.

Mr. Murray: The defendants contest the values of Schedule A only in respect of painting and elevators; so that is all of this witness—Oh, just one more question.

Q. Do you remember seeing the ice-compressor in the basement? A. I would not say for sure. It is three years ago when I was in there.

Mr. Murray: That is all.

1001 Mr. Schenck: I think my work is considerably shortened by the statement of Mr. Murray.

The Court: Yes, that is a fair statement, and in accordance with his concession.

Mr. Schenck: Yes.

Cross examination by Mr. Schenck.

Q. Mr. Switzer, you said that when you went to the job you told Mr. Lukach your mission? A. Yes.

Q. And what was your mission? A. To go up to the building and make an estimate of the cost

1002 to complete the job.

Q. And you gave the date when you went there as the 25th of May? A. Correct.

Q. When did you first hear about this matter? A. On the 23rd, two days previously.

Q. Two days previously to that? A. Yes.

Q. Did you understand that this estimate that you were to make was for the purpose of Keeler & Company completing the job? A. No, sir.

Q. You knew that it was not for that purpose? A. No, sir; we are not in that line of business.

Q. What is that? A. I say, we are not in that line of business. 1003

Q. I see. You do not do the work? A. No.

Q. On which you make estimates? A. No.

Q. You make estimates so that others can do the work on those estimates? A. As a rule, we are asked from surety people and people in the same line of business—in the building line—to help them along, when they get to a point of quantity survey and the pricing of it. That is my mission.

Q. I am very glad that you are so frank with me. You do quite a lot of work for surety companies? A. Not alone for surety companies, but for builders or anyone who comes in. I would do 1004 an estimate for you, if you came in.

Q. Surely. But I mean that the estimates that you make are made not for the purpose of completing any work? A. No, sir.

Q. But for the purpose of advising people who are curious or interested in knowing— A. I would not say "curious." We want to give them an honest price on the work.

Q. Yes, and you understood that your employer had been asked by these two surety companies to make an investigation of the state of this job, and to give an estimate as to how much it would cost to 1005 complete the work? A. That is right.

Q. Now, were you asked to ascertain whether or not the building, as it stood, was in strict accordance with the plans and specifications? A. Well, that is part of my mission, but not exactly. I only want to get at the cost of the finished job, and when I want to see my way through, certainly I have got to have plans and specifications to enlighten me.

1006 Q. Yes. There, too, you have been very frank. It was the completion of this job, rather than ascertaining whether it was in accordance with the plans and specifications— A. That is all I was interested in—the price of the work.

Q. You went there on the 25th of May? A. Yes.

Q. I wish you would give me the extent of your examination? By the way, did you do all of this yourself personally or did you have some assistance? A. No; all personally.

Q. All yourself? A. Yes.

Q. And did you take with you the plans and specifications? A. I had them with me, yes.

1007 Q. And in estimating what was required to complete this job, did you, in each instance, check up with the plans and specifications to see what was called for? A. No; as a rule a man goes through a building and makes his notes, and then goes to his office and looks over his plans and specifications, and gets a result on paper.

Q. You made some reference to this painting contract. Were you given a copy of the painting contract? A. I had papers pertaining to the whole building, and I found that contract in them.

Mr. Schenck: And that was this Gladstone
1008 contract which has been offered in evidence here. May I have that?

(Paper handed to Mr. Schenck by the Clerk.)

Q. You were given this blue-covered contract of the Globe Painting and Decorating Company, which has been marked Defendants' Exhibit J, were you (handing witness)? That is one of the papers that you had? A. I could not say yes or no to that. It is so long ago.

Q. You don't remember that? A. No. 1009

Q. All right. How long did this examination of yours take? A. It took me about—had to go there on and off, with other work, you know, that I have to do—

Q. (Interposing.) Yes. A. So I could not spend the whole week on it. I presume it took me about the extent of six weeks before I got through with that building, in the building.

Q. Speaking generally, now, and not tying you down to hours, about how many days were you making your examination? A. It took me, to make that examination, about, say, 30 working days.

Q. Of course, this was quite a complicated job, 1010 was it not? A. Not for me.

Q. Well, it involved a lot of details? A. Not so very much.

Q. At any rate, it involved 30 working days approximately? A. Well, that is all right, because that is the extension of the job—200 feet by 200, and 44 stories high. That makes a lot of difference.

The Court: The witness means it may be a lengthy job, but not intricate or complicated?

The Witness: That is the idea. 1011

Q. You did not want your investigations to be left merely to your memory, did you? A. No.

Q. So you made a written report of the result of your investigations? A. I did.

Q. Have you got that here? A. I believe we have.

Q. Could I see that? A. My papers are with Mr. Murray. I don't know if he has got it or not.

1012 Mr. Murray: I would have to look for it; but I do not see the propriety anyway, your Honor, in view of the fact that there are only two questions involved in this witness's testimony—and that is the elevators and the painting.

Mr. Schenck: That is exactly what I am interested in.

Mr. Murray: I will be glad to show him what Mr. Switzer said in those respects.

Mr. Schenck: Am I to understand that you refuse to show me what Mr. Switzer said in other respects—because I am interested to

1013 know whether or not Mr. Switzer reported to you that it would require $170,000 to complete, and that there were $230,000 of variations? Of course, you know that is what I am interested in.

Mr. Murray: Well, I do not think that is a proper request.

Mr. Schenck: I press my request, your Honor.

The Court: Well, I can not order the production of the instrument for general purposes. After all, the direct examination was

1014 limited in its scope; and your cross examination should be similarly limited, unless you want to make the witness your own. And as to a report made, after all that is more or less privileged—a survey from an agent to a principal.

Mr. Schenck I quite realize that, and, of course, these questions are never pressed to their ultimate conclusion. I realize the privileged character of it; but I also realize, since Mr. Murray presses that privilege, that I am

entitled to the inference that that report contains matters against his own interest; and that is all I am desirous of having. 1015

Mr. Murray: I do not think I should be put in this position, your Honor. If Mr. Schenck wishes to make Mr. Switzer his own witness, Mr. Switzer can produce his report for him; but I do not want to be—

Mr. Schenck: I am not making Mr. Switzer my own witness. I am asking him for a written report which he made at the time to his employer—the defendants—in relation to the state of this job.

The Court: I shall not order the production of the instrument—save for those paragraphs that relate to such matters as the witness has specifically testified to. But, at the same time, I will call the attention of counsel to the fact that inevitably there are certain inferences to be drawn from a reluctance to produce the report. 1016

Mr. Murray: If the report is produced, then I shall be—

The Court: It does not mean that the production of the report would permit Mr. Schenck to go into cross examination on matters not covered in the direct examination. If he desired so to do, then he would make the witness his own as to those matters. 1017

Mr. Murray: But if the report is produced, then it will be necessary for me to go into considerable redirect examination, in order to have him explain the items which appear in there.

The Court: That may be; but I have given my ruling as I see it.

1018 Mr. Schenck: That is all, Mr. Switzer.

(Witness excused)

The Court: We will have the next witness sworn, and go on for a few minutes.

Mr. Murray: I thought there was something decided about this report of Mr. Switzer's, your Honor? I was directed to produce the report, so far as—

The Court: I made no direction.

ROBERT P. BANFIELD, called as a witness on be-
1019 half of the defendants, being first duly sworn, testified as follows:

Direct examination by Mr. Murray.

Q. Mr. Banfield, what is your business? A. Construction engineer.

Q. Louder, please. A. Construction engineer.

Q. And with whom were you connected in 1929 and 1930? A. A. E. Lefcourt Realty Holdings.

Q. And in your connection with that organization did you have anything to do with the building at 59th Street, known as the Essex House? A. I did.

1020 Q. What was your connection with the Lefcourt organization? A. General superintendent of construction.

Q. And what duties did that office or position entail? A. It entailed supervision of the erection of all of Mr. Lefcourt's buildings from the time the property was bought and it was decided to build a building upon it.

Q. And after the building was started, what were your duties in connection therewith? A.

Still the same—to supervision its construction until completion. 1021

Q. That is, from the time the property was purchased until the building was completed, you had charge of it? A. Yes, sir.

Q. General charge? A. Yes, sir.

Q. Did you have other subordinates under you? A. I did.

Q. Sometimes was there more than one building being constructed at the same time? A. There were.

Q. Do you know whether or do you remember whether there was any other building being constructed at the same time that this particular one was being constructed? A. There were. 1022

Q. How many? A. Four others.

Q. How many buildings in all had been erected by the Lefcourt organization during your connection with it? A. Between fourteen and sixteen buildings. I can not state just exactly.

Q. And you were familiar with the erection of all of those buildings? A. I was.

Q. And what type buildings were they? A. Loft buildings, office buildings, and apartment hotels.

Q. How many of those buildings were in New York City? A. All but one. 1023

Q. And where was that one? A. In Newark.

Q. And is that the Newark job of which Mr. Grad spoke the other day? A. It is.

Q. Now, when did you first come into contact with anything regarding this particular job? A. When Mr. Haas brought me a set of plans and specifications, put them on my desk, and told me that they had decided to build a building of that type at 59th Street.

1024 Q. And when was that? A. Some time in the fall of 1929.

Q. Do you know whether these plans and specifications are the same—will you give me the original plans, please?

Mr. Judd: Yes (handing papers to Mr. Murray).

Q. Would you say these were the plans which were shown to you at that time (handing witness)?

Mr. Murray: That is Plaintiff's Exhibit—

Mr. Judd: Five.

1025 Mr. Murray: Plaintiff's Exhibit No. 5.

The Court: Is there any doubt about it?

The Witness: They are (handing papers to Mr. Murray).

Q. And are these the specifications (handing witness)? A. They are.

Mr. Judd: Referring to—

Mr. Murray: Plaintiff's Exhibit No. 4.

Q. Do you know whether they were handed to you at the same time specifications similar to those (handing witness)?

1026 Mr. Judd: Referring to Exhibits 98, 99, 100, 101, and 102.

Mr. Murray: Yes. Thank you.

A. I can testify that I have seen these specifications or similar ones before, but I can not testify that they were handed to me at the time I received that particular specification there (indicating).

Q. Have you any recollection—independent recollection now as to whether or not these were

the only specifications handed to you, or whether possibly specifications similar to those were handed to you? A. To the best of my recollection, I received the bound specifications, and the plans which I just looked at. 1027

Q. Mr. Banfield, you testified late yesterday that certain plans and specifications were handed to you upon which a building was to be erected. Will you proceed to state what you first did? A. I looked the plans and specifications over for the purpose of ascertaining what kind and type and so forth of building it was; also with reference to whether the equipment and the building in general was in keeping with the type of buildings that Mr. Lefcourt was in the habit of erecting. 1028

Q. Did you have an organization who worked with you on this project? A. I did.

Q. Did you hire any men for this project? A. I did.

Q. Who in particular came into the organization at that time who had not been in it before? A. Mr. Lush.

Q. Do you know whether Mr. Lush had any previous contract with such a project for this plot of land? A. He did.

Q. Do you know whether he had worked with Mr. Grad originally on the specifications, before the Lefcourt organization came into the matter? A. Well, at the time that I took these plans and specifications I discussed with Mr. Haas as to would we handle the job in the usual way and the usual procedure as all our other jobs had been handled, and Mr. Haas— 1029

Mr. Schenck: I think I must object to conversations among different people in the organization.

1030 The Court: Yes.

Q. At any rate, Mr. Lush was employed; is that correct? A. He was.

Q. And thereafter were there conferences regarding the drawing of detailed specifications? A. There were.

Q. What people entered into these conferences? A. Mr. Haas and the Engineering and Inspection Department.

Q. Were there any outside people who entered into the discussions? A. Mr. Grad and Mr. Kingsley.

1031 Q. Had Mr. Kingsley been retained as mechanical engineer for this job? A. He had.

Q. During the progress of the project did you at any time see anybody from The Prudence Company? A. I did.

Q. And whom did you see? A. Mr. Walters.

Q. Who was Mr. Walters? A. He was in charge of the Engineering and Inspection Department for The Prudence Company.

Mr. Schenck: I think I must object to that, as a conclusion.

The Court: Yes, he can say what he saw Mr. Walters do.

1032 Q. Did you see any letters which Mr. Walters had written to the Central Park Properties? A. I did.

Q. And those letters were on Prudence stationery? A. They were.

Q. And how did Mr. Walters designate himself? A. As head of the Engineering and Inspection Department.

Q. Of The Prudence Company? A. Of The Prudence Company.

Q. In preparing for the equipment to go into 1033
the building will you state generally what was done as respects obtaining bids or examining other projects in order to make contracts? A. First we had to decide whether the particular specification and the plan to which that particular specification applied was what we wanted to go ahead with, and to that end, why, we held conferences and discussions and visited other jobs, that is other buildings in the City to make inspections and comparisons and so forth.

Q. As to the excavation item, did you follow the plans in every respect so far as excavation was concerned? A. No, sir. 1034

Q. In what respect didn't you follow the plans? A. Well, upon investigation we found that the part of the cellar allotted to the kitchen and kitchen equipment did not have sufficient headroom for the installation of sufficient ventilation; so we decided that we would have to make that portion of the cellar deeper.

Q. In other words, if you had proceeded on the original plan the kitchen would not in your opinion have been a proper kitchen?

Mr. Schenck: I object.

A. That is correct. 1035

The Court: Sustained.

Mr. Murray: Exception.

Q. What then did you do as regards the excavation?

Mr. Schenck: I object to this as being irrelevant to this controversy.

The Court: I do not see what this has to do with the case at all. Why don't you get down to the matters at issue?

Discussion

1036 Mr. Murray: It has this to do with it, your Honor—that, as I have indicated a number of times before, The Prudence Company has picked out certain changes, as I might call them, from the original specifications, where probably a little less money was spent by the Central Park Properties. I offer to prove that in many other respects the Central Park Properties improved upon the plans which were originally submitted, so as to increase the cost of the building immeasurably above what the original cost on the original plans would have been, and that by reason of these
1037 changes, on which The Prudence Company does not claim, a much better building was erected than as contemplated by the original plans.

(Argument of counsel has been abbreviated.)

The Court: I think it is a defense that should have been set up specially.

Mr. Murray: Well, your Honor, they claim loss and damage; and all they are entitled to, under the bond, is loss and damage sustained by reason of the principal's failure to comply
1038 with the contract. When we deny that they sustained loss and damage, the whole thing is at issue, in my opinion.

The Court: But I do not think you can prove, under a general denial, a defense such as you seek here to establish,—giving proof of departures from the specifications, and contending that those departures were for the benefit of the building. How can the plaintiff ever know what he has got to meet in the case?

Mr. Murray: I do not think the mere fact 1039
that the plaintiff alleges and even proves substitutions in this building proves any damage whatsoever. I think the plaintiff should have gone further, and said that because of these, therefore, the security which they were relying upon was materially lessened.

The Court: Well, that is a different matter.

Mr. Murray: And they have not offered that proof.

The Court: Yes, they have shown in each instance that there is a difference in value between that which was specified and that 1040
which was substituted.

Mr. Murray: But there has been no proof offered to show that the building itself was not as good security as they bargained for.

The Court: I think there is prima facie proof which would justify a finding in that respect. However, we are discussing something that is generic to the case, and not specific as to what is now before me with this witness. I shall have to rule on the question that is put and is objected to; so we will proceed along that line.

Mr. Murray: Exception. Will you read 1041
the last question, now?

(Question read, as follows):

"Q. What, then, did you do as regards excavation?"

Mr. Schenck: And I am objecting to that question.

The Court: I sustain the objection.

Mr. Murray: Exception, please.

The Court: Yes.

Mr. Murray: Your Honor, I have a number of witnesses in addition to Mr. Banfield, whose testimony I had hoped to be able to

1042 introduce to show the difference in value between the building which is now up there and the building which it would have been if the plans and specifications had been followed in detail.

I make the offer of proof; and it possibly might simplify matters if your Honor were to rule on that offer, instead of my asking Mr. Banfield questions—

The Court (Interposing): No, I will not do that. I will take each matter up as it comes along.

1043 Q. Were there, Mr. Banfield, instances where the material furnished and the equipment furnished and the work done on this building was in addition to or more valuable than the work and material which would have been necessary in order to complete the building according to the original plans and specifications? A. There were.

Mr. Schenck: I object to the question on the grounds that it is irrelevant, immaterial and incompetent, involving conclusions and alternative features.

The Court: I sustain the objection.

Mr. Murray: Exception.

1044 The Court: If you want to ask him what additions were made beyond that which was called for by the specifications, that is a proper question.

Q. What additional work and material and equipment was furnished in this building in addition to what was provided by the original plans and specifications, if you know, Mr. Banfield?

Mr. Schenck: I think I shall object to that question on the ground that it is irrelevant, and not within the pleadings.

The Court: I am not sure that your objection is not good, but something may develop. At any rate, I will overrule the objection. 1045

Mr. Schenck: Your Honor will grant me an exception?

The Court: Yes.

A. I have here a list of some of the things: We installed copper radiators throughout the building, where cast iron phantom type radiators were originally specified, at an approximate cost of $20,000.

Mr. Schenck: The question does not call for the cost, and I do not think we are bound by that. 1046

The Court: No.

Mr. Schenck: And I do not think we are bound by the approximations of the witness in regard to it.

The Court: No.

Q. What was the additional cost caused by the installation of copper radiators?

Mr. Schenck: I object to that on the ground that it is irrelevant, immaterial, and that the witness is not competent to answer.

The Court: I will sustain the objection. 1047

Mr. Murray: Exception.

Q. What other item is there, Mr. Banfield? A. In every instance throughout the building where there were set-backs and the original specifications called for slag roof, we put quarry tile on those roofs; we put casement windows—that is, windows opening out similar to doors, in place of double hung windows. We put low radiators, with marble tops on them, forming steps, so that those

1048 terrances became available to the tenants of those respective apartments.

Q. What was the additional cost involved in doing that work?

Mr. Schenck: I make the same objection, your Honor.

The Court: Sustained.

Mr. Murray: Exception.

Q. What other item, Mr. Banfield? A. We increased the depth of the area used by the kitchen and refrigerating equipment, to a depth—an added depth of three feet.

1049 Q. And what was involved in that change? A. General excavation, additional concrete and brick work for the sustaining walls, and additional steel, and additional ventilation—and when I say "ventilation" I mean duct work, metal work and so forth.

Q. And the additional depth which was excavated was three feet, is that right? A. Three feet.

Q. And was that rock excavation? A. It was.

Q. And what was the cost of that additional work?

Mr. Schenck: I object to that on the same

1050 grounds.

The Court: Sustained.

Mr. Murray: Exception.

A. We made changes in the elevator equipment, putting in a better signal system and so forth.

Q. And what was the additional cost of that?

Mr. Schenck: Same objection.

The Court: Sustained.

Mr. Murray: Exception.

A. We installed a vertical high-tension system throughout the building.

Q. And what is a vertical high-tension system? 1051
A. Ordinarily in a high-tension system there is a transformer vault either in the cellar or in some lower portion of the building, by which they transfer this high-tension current into low-tension current. From there on it is distributed throughout the building as low-tension current. In other words, the consumer pays for the line losses for the complete height of the building; and the system which we installed,—we had a high-tension system throughout the building, and we fireproofed vaults at four different levels in the building,—pipes encased in concrete to carry these high-tension lines through the building, and dis- 1052
tribute this current from four different points or four different elevations in the building; thereby minimizing the loss of current.

Q. What was the value of that additional work? A. About $30,000.

Mr. Murray: Do not answer these questions until after counsel has had an opportunity to object and the Court an opportunity to rule.

Mr. Schenck: I object to that, your Honor.

The Court: Sustained.

Mr. Murray: Exception. 1053

Q. In any instance where I ask what the value was, do not answer the question until you have heard what the ruling is. A. We installed soundproofing around all elevator shafts, wherever they came up against living quarters.

Q. And that was not provided by the original specifications? A. All these that I have so far enumerated were not required by the original specifications.

1054 Q. And what was the cost of that work?

Mr. Schenck: I make the same objection, your Honor.

The Court: Sustained.

Mr. Murray: Exception.

A. We used four by four tile—wall tile throughout all bath rooms in the apartments of the building, instead of a three by six tile specified.

Q. And what was the value of that extra work?

Mr. Schenck: Same objection.

The Court: Sustained.

Mr. Murray: Exception.

1055

A. We had to cinder-fill all ground floors and arches throughout the building.

Q. What did the specifications provide, if anything, regarding cinder-fill? A. They specified originally what is known as a monolithic finish; that is, the cement finish is applied directly to the arch.

Q. What was the value of that additional work?

Mr. Schenck: I make the some objection.

The Court: Sustained.

Mr. Murray: Exception.

1056 The Witness: We installed a steel house tank on the roof of the building, in place of a wooden tank which was originally specified; and we enclosed this steel house tank in a brick structure, the outside of which was the same architecturally as the rest of the building.

Q. What was the value of that extra work?

Mr. Schenck: I make the same objection.

The Court: Sustained.

Mr. Murray: Exception. 1057

A. We increased the size of the incinerator from that specified.

Q. And what was the cost of that?

Mr. Schenck: I make the same objection.

The Court: Sustained.

Mr. Murray: Exception.

A. We installed a pressure system of indirect heating over the entrance of the 59th Street side of the building.

Q. And what would be the effect of that, Mr. Banfield? A. The ordinary radiation provided 1058
did not provide for any circulation, and with the type of ventilating system that was installed in certain parts of the first floor and the basement it would cause a slight vacuum within the first floor of the building; so that if you opened the doors, windows and so forth, you would get a draft even though there was no wind outside. By the installation of this apparatus we eliminated that slight vacuum.

Q. What was the value of that additional work?

Mr. Schenck: I make the same objection.

The Court: Sustained.

Mr. Murray: Exception. 1059

Q. Now, was there any item as regards steel? A. There was.

Q. And what is that item? A. At most of the corners of the building we increased the size of the living rooms of the apartments, which necessitated an increase of about 500 tons of steel.

Q. What was the additional cost—the additional value of that change?

Mr. Schenck: I make the same objection.

1060 The Court: Sustained.

Mr. Murray: Exception.

The Court: I assume, Mr. Murray, that none of these changes that Mr. Banfield has referred to—that none of these was referred to the Prudence Company or any written authority given with respect to them?

Mr. Murray: I am not prepared to say, your Honor, whether or not these particular items were approved.

Mr. Schenck: I think I should state that they are all news to me, and that my investigation has not discovered any single one of
1061 these items. I am merely speaking personally myself. They come to me as news at the present moment in the case.

Mr. Murray: I am not prepared to say, your Honor, that these changes were not known to the Prudence Company, or whether the approval of them was in writing or otherwise.

The Court: Obviously, you can see the reason for my question: If approval had been obtained, then the value of the work done would become important, perhaps.

1062 Mr. Murray: I have not gone into that question. The indications are that some, at least, of them were approved but I am not in position to state definitely on that right now.

The Court: I will say this, then, for your benefit: That if you give proof of such approval, then you may offer proof as to the value of changes which were approved.

Mr. Murray: I may be able to do that with another witness.

Q. How many years' experience have you had, Mr. Banfield, in the construction business? A. About twenty-five years. 1063

Q. Now, assuming that there was about $100,000 worth of work to be done to make this building ready for occupancy, and that by performing that $100,000 worth of work the building would be complete, can you state whether or not the building, with these completed items in it, was a building of a higher value than the building which would have been erected in strict accordance with the plans and specifications? A. It would.

Mr. Schenck: I object to that on the ground that it is irrelevant, and also incompetent. 1064

The Court: Sustained.

Mr. Murray: Exception.

Q. Have you seen the building since its completion? A. I have.

Q. And after having seen the building can you state whether or not the building as now constituted, leaving out of consideration any changes in the lobby floor or basement, is a building of greater value than the building which would have been erected if the original plans and specifications had been complied with strictly? 1065

Mr. Schenck: I object to that on the same grounds.

The Court: Sustained.

Mr. Murray: Exception. Now, in connection, your Honor, with this question which we have been discussing, as to changes, I again call your attention to Article 15 of the general conditions—

1066 The Court (Interposing): Let me see it.

Mr. Murray: Yes (handing bound volume to the Court).

The Court: But there is this following clause: "That no extra work or change shall be made unless in pursuance of a written order from the owner, signed or countersigned by the architect, or a written order from the architect stating that the owner has authorized the extra work or change; and no claim for an addition to the contract sum shall be valid unless so ordered."

1067 Q. Mr. Banfield, what was included in each contract made by Central Park Properties with the several contractors?

Mr. Schenck: I object—

Q. (Continuing.) What was the nature of the papers constituting the contract?

Mr. Schenck: I think I must object to that. I do not see how the agreement that Central Park Properties made with contractors or sub-contractors—

The Court (Interposing): It might have this authority in it that is referred to in that
1068 paragraph. Overruled.

A. One was that the general agreement clause of the specifications was part of their contract.

Q. Was there included in their contract any specification for the doing of the work or any reference to a specification for the doing of the work? A. There was. A specification and a plan became part of their contract. They must sign that with the contract.

Q. I show you now Defendants' Exhibit G for Identification, and ask you whether the contractor for heating and ventilating approved the specification as the basis for the work to be done by him (handing witness)? A. He did. 1069

Mr. Schenck: I move to strike out the answer. I do not see the relevancy of the question. Possibly it is because I do not remember the exhibit, but what the contractor approved and who was intended by the word "contractor" in reference to this exhibit, I do not know.

The Court: Will you read the question? 1070
(Question read.)

The Court: I sustain the objection.

Mr. Murray: Exception.

Q. In every case was there a specification made a part of the contractor's contract? A. There was.

Mr. Schenck: I move to strike out "was made a part of the contractor's contract."

The Court: It is not quite clear to me what you mean.

Q. Were there different specifications drawn for each contractor? A. There was. 1071

The Court: Each sub-contractor.

Q. Each sub-contractor. A. There was.

Q. And was the specification for each particular work made a part of the contract for the doing of that work? A. There was.

Q. Do you know by whom the specifications were prepared, the several specifications were pre-

1072 pared, which went into and became a part of the several contracts?

Mr. Schenck: Sub-contracts.

The Court: Sub-contracts.

A. Frank Grad and Mr. Kingsley.

Q. Was every specification used in the doing of this work approved by Mr. Grad?

Mr. Schenck: I think I must object to that. Mr. Grad has been upon the stand. We should not have secondary evidence in regard to his proof.

1073 The Court: I will overrule the objection.

Mr. Schenck: Exception.

A. What is the question?

The Court: Did Grad approve these specifications?

The Witness: He did.

Q. Mr. Banfield, you know that certain bronze screens were not installed on the lobby floor? A. I do.

Q. In your opinion did the absence of these bronze screens decrease the value of the building in any respect?

1074

Mr. Schenck: I object to that on the ground it is irrelevant and incompetent.

The Court: Overruled.

Mr. Schenck: Exception.

A. They did not.

Q. Do you remember that certain racks and shelving were not placed in the check room on the first floor, and that certain mail and key racks and shelving were not placed in the room clerk's office? A. I remember.

Q. And that file racks and wood screens were not placed on the counters of the desk space in the main lobby? A. That is correct. 1075

Q. And that a counter and six phone booths were not placed in a telephone room, and that wood folding doors were not placed between private dining rooms on the first floor. Do you remember all these several items? A. I do.

Q. In your opinion did the absence of these items decrease the value of the building? A. They did not.

The Court: Are you going to ask about each one in Schedule B, every item of Schedule B? If you are I suggest that you show him the exhibit and ask him what you want with respect to those items. 1076

Mr. Schenck: I think for the purpose of shortening it I could take it for granted that he had asked him in regard to each of the items on Schedule B and that the witness's answer, if that is correct, is the same.

The Court: If that is the fact why not shorten it that way?

Mr. Murray: That is perfectly satisfactory to me, your Honor. It is stipulated, then, that the witness would testify that these several items listed in Schedule B by their omission did not decrease the value of the building. 1077

Mr. Schenck: I think you can ask him in that summary way.

The Witness: That is right.

Mr. Schenck: Instead of going into each item.

The Court: And he so testifies.

The Witness: That is correct.

1078 Mr. Schenck: And in regard to each of those items it is understood that I raise the same objection and your Honor's ruling is the same?

The Court: Yes, and you have an exception.

Q. I show you Defendants' Exhibit F, Mr. Banfield (handing witness). A. (Witness hands exhibit to Mr. Murray.)

Q. Now I show you Defendants' Exhibit G for Identification (handing witness), and ask you whether that is an exact copy of the specification
1079 which is referred to in Defendants' Exhibit F? A. It is.

Mr. Murray: I offer it in evidence.

(Defendants' Exhibit G for Identification now marked in evidence.)

Q. Did you visit this job during the course of construction, Mr. Banfield? A. I did.

Q. Did you keep or retain general supervision over the work being performed there? A. I did.

Q. Was there an office in the building during the course of construction? A. There was.

Q. And were there plans and specifications kept
1080 in that room? A. There were.

Q. What kind of plans were kept there? A. Plans and specifications which were duplicates of the signed plans and specifications of the respective contractors on the job, certain plans for the purpose of noting the progress of the work and the installation of work and materials. In fact all records of the job necessary to its completion.

Q. And in what place or in what manner were they kept in that office? A. In certain files, tables,

and so forth, with the exception of what we term 1081
"progress charts" which were kept on the wall for the purpose of contractors seeing if they were on time and in coordination with other trades that they had to follow up or that had to follow them, and for my own record when I stepped into the job, to look around and tell approximately the status without looking at each individual piece of work.

Q. The progress charts were hung on the wall, you say? A. They were.

Q. As the work progressed would certain markings be placed upon these charts? A. They would. 1082

Q. Referring specifically to steam fitting work, what would the charts show?

Mr. Schenck: I do not see the relevancy of this. I do not want to make objections constantly.

The Court: What is the relevancy of it?

Mr. Murray: The point is that the inspectors of The Prudence Company visited that office in addition to the rest of the work and examined these plans and saw exactly what was going on, and that they had knowledge of the fact that certain particular items for 1083
which The Prudence Company now claims were not being performed.

The Court: Where are these charts that you speak of? After all, the witness is describing them. Are they here?

Q. Do you know where those charts are now, Mr. Banfield? A. I do not.

Q. Do you know what became of them after Central Park Properties went off the job? A. To

1084 the best of my knowledge they were removed to the Lefcourt office.

Q. Have you searched the Lefcourt organization offices to attempt to discover such charts? A. I have.

Q. And have you been able to find them? A. I have not.

Q. Referring specifically to steam fitting work, what did the charts show from day to day? A. We had a particular plan known as the riser sheet, showing each steam riser and its number in relation to the number on the floor plan. A copy of that particular plan was tacked on the
1085 wall and as the steamfitter progressed with his work the particular riser or diagram of the riser on that plan was marked off with a colored crayon to the height that the steamfitter had progressed up to that time, and the date put alongside.

Q. What do you mean by a riser? What is a riser? A. A riser in this particular instance is a pipe running vertically for the purpose of supplying steam to radiators on the respective floors.

Q. Can you tell me whether if provision had been made for the placing of radiators, steam radiators, in interior bathrooms, there would have been a separate riser shown for that?

1086

Mr. Schenck: I object to that upon the ground it is argumentative.

The Court: He can ask whether the plans did show that or whether the charts did show that.

Q. Did the charts of which you speak show any provision for a riser for interior bathrooms? A. We had two sets of plans, and I do not care to state from memory without actually seeing that,

that the particular plan we had there showed these risers, and that we did not mark them off, or that the plan did not show the risers. 1087

Q. Would there appear, or did there appear on this chart, the several risers which were being installed? A. There were to the best of my recollection some fifty or sixty risers all told, or sets of risers.

Q. And is it possible that all of the sets might not have been shown on this chart? A. It is.

Q. When is the steam fitting work first started? What is the condition of the building when the steam fitters start the installation of risers, Mr. Banfield? A. Approximately eight stories of steel and four stories of floor arches. 1088

Q. The flooring has been laid on about four floors? A. That is correct.

Q. And the between these cement floors is it open space? A. It is.

Q. And is the presence of the risers for steam obvious to anybody who comes in? A. It is.

Mr. Schenck: I do not think the witness should state that the presence of steam is obvious to anybody who comes in.

The Court: That anyone who came in and had his eyes open could see it. I suppose that is what is meant. 1089

Q. While you were upon the job did you at any time see men who you knew to be representatives of The Prudence Company there? A. I did.

Q. Whom did you see there? A. I saw Mr. Walters, I saw Mr.—I cannot recollect his name; I will think of it in a minute. Mr. Schermerhorn.

Q. Do you remember whether you ever saw Mr. Billsborrow there? A. I cannot recollect that I did.

1090 Q. Where in the building have you seen Mr. Walters and Mr. Schermerhorn? A. Various parts of the building at different times.

Q. Have you seen them in the superintendent's office? A. I have.

Q. Had you at different times discussed the work with them? A. I did.

Q. Do you remember that mouldings had been which had been installed? A. I do.

Q. Will you tell us what quality of medicine cabinet they were? A. They were about the best of the respective kinds that we could buy.

1091 Mr. Schenck: I think I must move to strike that out, your Honor.

The Court: I will deny the motion.

Mr. Schenck: Exception.

Q. Did you see the building at the time that the painting contractor had performed all the work which he was required to perform by his contract? A. I did.

Q. In your opinion what would it have cost to complete with the final coats of paint those spaces which the contractor had originally painted with the basic coats?

1092 Mr. Schenck: I object on the ground that the witness is not shown to be qualified.

The Court: Overruled.

Mr. Schenck: Exception.

A. Do I understand you, to complete the contract as originally specified?

Q. (Read by the stenographer.) A. About $14,000.

Q. Do you remember the medicine cabinets installed in all of the living quarters in that building? A. I do.

Q. With those mouldings removed how much in your opinion would it have been necessary to pay to complete the painting of those walls because of the removal of the moulding? A. About $12,000. 1093

Q. As to the lighting fixtures, do you remember the lighting fixtures, Mr. Banfield? A. I do.

Q. Will you testify or tell us what quality of lighting fixtures were installed in that building, as to quality? A. Installed a fixture that was in keeping with the conformity of that type of hotel.

Q. Do I understand you to mean that the quality of fixture which was installed there was suitable to that building? A. I do. 1094

Q. There were soap dishes installed in the guest baths, whereas the original specification called for the combination soap, glass and toothbrush holders. Will you explain to us just what was installed in the bathrooms in respect of holders? A. The medicine cabinet was so constructed that in the bottom of the medicine cabinet there was a glass shelf which was not obstructed when the door was closed. In other words, there was an opening at the bottom there at all times, which takes the place of the necessity for the installation of toothbrush holders, glass holder, and so forth. In other words, the toothbrush holder, 1095 glass holder and so forth, as enumerated there, are incorporated in the medicine cabinet.

Q. And in addition there was a soap dish installed? A. A soap dish; yes, sir.

Q. In your opinion was the medicine cabinet with this additional glass shelf and the soap dishes equal in value and in quality to a medicine cabinet without that glass shelf and a combination soap, glass and toothbrush holders? A. I would say it is superior.

1096 Q. What investigation and research was made by you and others in your organization with your knowledge as regards finding fixtures, lighting fixtures and other equipment for the building? A. We made visits—when I say "we" I mean sometimes myself or perhaps Mr. Youngson of the Mechanical Department, or Mr. Haas, and various ones; sometimes alone, sometimes accompanying one another. In other words, in all these changes and all these various items we investigated insofar that we went to hotels that were already in operation and by our observation and inquiries and so forth arrived at these
1097 respective conclusions.

Q. Did you in the doing of your work endeavor to buy the cheapest possible equipment and materials? A. We did not. Or I did not.

Q. How many bids did you get on these several contracts, proposed contracts, for fixtures and equipment? A. Do you mean the number of bids?

Q. Yes, running from what to what? A. Well, from say three up to as much as ten.

Q. I call your attention to the bedroom mirrors which were plain instead of bevelled as specified in the specifications. Tell me whether in your opinion the plain mirror is of greater value than
1098 the bevelled mirror. A. From the standpoint of dollars and cents I would say that it is not as expensive as a bevelled mirror, but from the standpoint of usefulness, in the particular instance in which it was used it is more valuable, insofar that they were very narrow doors and if you bevelled the mirrors you take away part of the usefulness of the mirror, approximately an inch on either side; and the mirrors to begin with were not quite or approximately eighteen inches,

and if we bevelled the mirror in place of an eighteen inch mirror for the bedroom we only had the equivalent of a sixteen inch mirror. We investigated and so forth and came to those conclusions. 1099

Cross examination by Mr. Schenck.

Q. Mr. Banfield, what apartment hotels had you previously supervised the construction of for the Lefcourt organization? A. None.

Q. So that as to this particular type of building, this was your first detailed experience? A. Of that magnitude, yes.

Q. You stated on your direct examination that at the same time this work was going on the Lefcourt organization was constructing three or four other jobs. A. That is true. 1100

Q. Of which you were also in general supervision? A. That is correct.

Q. And as I understood your office you were the general supervisor of construction of all of the Lefcourt construction work? A. That is correct; under the jurisdiction of Mr. Haas.

Q. Mr. Haas's particular function was the business of financial end of the enterprise? A. It was not.

Q. I do not know, you know, so I am just inquiring. It was the same as yours, was it? A. Yes, sir. 1101

Q. The practical construction end? A. Mr. Haas was secretary and treasurer of the Lefcourt organization in charge of construction.

Q. Yes, but your function at any rate was the practical construction end of it as distinguished, we will say, from the financial end? A. That is correct.

1102 Q. So that you had no contact directly with the offices of The Prudence Company in regard to the building loan agreement or the advancement of loans under it? A. That is correct.

Q. Was there a supervisor of construction on this particular job under you? A. There was.

Q. And what was his name? A. Mr. Kiely.

Q. Approximately how often would you go to this job? A. Every day.

Q. And would spend a part of every day upon it? A. Correct.

Q. And speaking very generally, were you and Mr. Haas the what might be called last authority
1103 in regard to these changes from plans and specifications? A. As far as I was concerned Mr. Haas was the last authority with me; but I cannot answer for Mr. Haas.

Q. You spoke of Mr. Kingsley. Who was Mr. Kingsley? A. Mr. Kingsley was the mechanical engineer employed by the Lefcourt organization for the drawing of the plans and specifications for all the mechanical work for these respective jobs.

Q. He was not an architect? A. Mechanical engineer.

Q. He was not an architect? A. No.

1104 Q. After Mr. Grad left the job who was the supervising architect upon this job? A. Victor Bark, Jr.

Q. He was the supervising architect? A. I beg pardon, Victor Bark, Jr., was the architect of record in the Building Department.

Q. The architect of record in the Building Department, but he was not the supervising architect, was he? A. He was not.

Q. So that after Mr. Grad left this job, this job had no supervising architect? A. You say after

Mr. Grad left the job. Mr. Grad was not the supervising architect. 1105

Q. I realize that that may be your contention, but I am asking whether after Mr. Grad left the job there was any supervising architect on this job. A. Not to the best of my knowledge.

Q. There is no reason why you should not answer me frankly, or argue with me, is there? A. Except that I did not quite understand your question.

Q. These general specifications which you said entered into the part of each and every sub-contractor on the job provided in Article 38, at page 9, that the architect was to have the general supervision and direction of the work, and it also provided that in case of the termination of the employment of the architect the owner should appoint a capable and reputable architect whose status under the contract should be the same as that of the former architect; and as I understand you that was never done? A. I do not know whether that is stated in the general conditions, so I cannot answer. 1106

Q. Taking for granted that it is stated in the general conditions. The general scale of these specifications, that a supervising architect be the representative of the owner on the job and determine as the last authority questions of plans or specifications, or whether work complied with plans and specifications—that was not carried out? A. Not in that sense, no. 1107

Q. What is that? A. Not in that sense, no.

Q. And as a matter of fact there was no architect who was issuing certificates as to progress of work or issuing certificates as to whether subcontractors were entitled to money under the work? A. There was not.

1108 Q. And as a matter of fact the Lefcourt organization was in reality the general contractor here, wasn't it? A. They were.

Q. You have testified on direct examination from a list of changes from plans and specifications that have not before been mentioned in the case, and I presume that in making up that list you went over all available material in the way of plans and specifications? A. I only spoke in generalities, and just hit certain things. I did not make a thorough study and go over these plans and specifications. It was simply things that came to my mind, knowing the job as I did.

1109 Q. So that you prepared this list from your memory? A. Practically from my memory.

Q. And you did not check up on plans and specifications, as to whether— A. I did look at a set of plans, but the original plans—I mean I did not take the original plans as provided by The Prudence Company and the original plans as became part of the contracts and sit down and make a study of them. I simply looked at the original plans as became part of The Prudence Company and said, well, that was what the plans originally called for, and from my memory I know approxi-

1110 mately what we done, and from that I made this list.

Q. I am, of course, inquiring whether you included on that list departures from plans and specifications which to your mind lessened the general value, as well as the departures that you claimed increased it. A. Would you care to see the list?

Q. No, I do not care to see the list, but did you— A. I simply made the comparison for the purpose of clarifying, and recollecting what the

difference was, and what changes that we had made—that is, material changes. 1111

Q. Of course, looking at it for the moment, if you will, from the standpoint of The Prudence Company, after the stage of construction gets to covering up with plaster, lath and plaster, certain work, it is very difficult to ascertain whether the work is in conformity with the plans and specifications or not. Did you recollect any changes in that respect, of work that had been covered up in the course of construction that in reality was changed from plans and specifications? A. If you will recall, I mentioned an item of steel. That is entirely covered up. 1112

Q. How about the dimensions of pipes? Was there any change in the dimensions of pipes? A. The dimensions of pipes in most cases and ninety-nine per cent. of the cases are still there for inspection. There is practically no piping in the building that is really covered up. It is not buried in the masonry or anything like that.

Q. You are making a very good argument, but I am asking for the facts. Was there any change in the dimensions of the pipes from plans and specifications, regardless of whether they knocked you in the eye or not, or regardless of whether they are hidden? Do you know of any such changes? A. Not to the best of my knowledge. 1113

Q. Do you recognize those specifications as the specifications of Mr. Kiely on the job (handing witness)? A. I believe I do.

Q. What? A. I believe I do.

Q. Will you turn to the plumbing specifications on page 14 and tell us whether there has been a change in respect of fittings for brass pipe to

1114 standard weight instead of heavy weight? A. There is in this particular specification.

Q. Now will you turn to page 23 of that specification. Has there been a change in pipe dimension there? A. There has.

Q. What is the change? A. One inch to three-quarters.

Q. One inch to three-quarters? A. Correct. And an inch and a half to an inch and a quarter.

Q. Now turn to page 34 and tell me whether the duplex ejector has been omitted and that "an" ejector has been substituted for a duplex ejector?

1115 Mr. Murray: I would like to know whether the specifications which the witness has are claimed to be the original specifications?

Mr. Schenck: No, they are claimed to be the specifications of Mr. Kiely in the actual operation of the job, and these are claimed to be departures unknown to us, in regard to structural matters covered up by construction.

Mr. Murray: Departures from what? Departures from what, the original specifications or from these specifications?

Mr. Schenck: If you will allow me to pro-
1116 ceed with the examination.

Q. Have you got it? A. I have. It refers to an addenda, and the addenda says, "In lieu of the pneumatic apparatus described," and so forth.

Q. Now if you will turn to the addendum. A. I have the addendum before me.

Q. Certain covering omitted on pipe branches. Perhaps I have not recited it accurately. A. That is correct. "No covering will be required on hot water branches."

1117

Q. I wonder if you could turn to the marble work section in that same specification and see whether you can find the place where one type of marble is substituted for another, and on that same page where saddles of one inch are substituted in place of saddles— A. Will you tell me what page you are referring to?

Q. I have not got the page here. Bl[illegible] Belge marble substituted for others. A. I see what you refer to.

Q. Now do you see a substitution of saddles of one inch instead of one inch and a quarter? A. I do.

1118

Redirect examination by Mr. Murray.

Q. You recognize these specifications which you have before you, Mr. Banfield? A. I do.

Q. As specifications which had been in Mr. Kiely's office? A. They were the specifications which we furnished to the construction office of the 59th Street job.

Q. And do you know where they have been since the Central Park Properties went off the job? A. No, sir.

1119

LOUIS HAAS, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination by Mr. Murray.

Q. Mr. Haas, what was your connection with the Lefcourt organization? A. Secretary and treasurer in charge of construction.

Q. And what duties did you perform in connection with that secretaryship and treasurership

1120 and in charge of construction? A. The awarding of contracts and supervising the Construction and Engineering Departments in the erection of the buildings.

Q. When and where did you first personally come in contact with The Prudence Company as regards this building? A. The day that the loan was closed at their Madison Avenue office.

Q. Whom did you see at that time? A. Mr. Bigelow.

Q. Do you know who Mr. Bigelow was? A. I believe he was an assistant vice-president or vice-president.

1121 Q. And what if anything did Mr. Bigelow show you at that time? A. A set of plans and a set of specifications.

Q. Did you at that time have a discussion with Mr. Bigelow as to the type of building to be erected, or anything in that connection? A. No, sir.

Q. What talk did you have with him?

Mr. Schenck: I object to this on the ground it is irrelevant so far as—

The Court: What is the purpose of the question?

1122 Mr. Murray: I simply want to show how the work was started. It is only going to take a very short time, your Honor.

The Court: But I do not see the relevancy.

Mr. Murray: If you want to have me tell you what he will testify to, Mr. Bigelow told him to communicate with Mr. Walters during the construction.

The Court: I will permit him to say that.

Mr. Schenck: Your Honor will grant me an exception. My contention is that this is

an attempt to vary the terms of the written contracts, and that the defendants are estopped from raising any such question by the specific terms of the bond, that state that there be no waiver of any of the provisions except in a particular manner, and that a waiver in one instance does not result in a waiver in another instance. 1023

The Court: Is this the conversation before the agreement was entered into?

The Witness: The same day, sir.

The Court: Before or after?

The Witness: Mr. Lefcourt and the attorneys were in one office consummating the deal and I was in the other office going— 1024

The Court: I will sustain the objection.

Mr. Murray: Exception.

Q. Did Mr. Bigelow during that conference mention Mr. Walters' name to you? A. Yes, sir.

Q. And what if anything did he say to you regarding Mr. Walters?

Mr. Schenck: That, of course, is the same thing.

The Court: Sustained.

Mr. Murray: Exception. 1025

Q. Did Mr. Bigelow at that time tell you that Mr. Walters would have complete charge of the relations between the Central Park Properties and The Prudence Company?

Mr. Schenck: Same objection.

The Court: Sustained.

Mr. Murray: Exception.

Q. Was it on September 24, 1929, that you had this conversation with Mr. Bigelow? A. I am pretty sure it was.

1126 Q. I show you Plaintiff's Exhibit No. 6 and ask you whether you ever saw that instrument before, Mr. Haas (handing witness)? A. I did.

Q. Are your initials on that instrument? A. Yes, sir.

Q. The initials "L. H." are yours? A. Yes, sir.

Q. When did you initial that instrument? A. On September 24, 1929.

Q. Was that the same day you had your conversations with Mr. Bigelow regarding Mr. Walters? A. I am quite sure it was.

Q. Do you remember the fact that the bronze
1127 work, certain bronze work, was omitted from the lobby floor of this building? A. Yes, sir.

Q. In your opinion did the omission of that bronze work decrease the value of the building?

Mr. Schenck: I raise the same objection I raised before.

The Court: Overruled.

Mr. Schenck: Your Honor will grant me an exception.

The Court: Yes.

A. It did not.

1128 Mr. Schenck: If Mr. Murray desires to proceed along that line I shall raise no objection to his asking the same question, lumping it, in regard to all the items of Schedule B.

The Court: And the witness may answer it that way.

Mr. Schenck: Your Honor granting me an exception.

The Court: Yes.

Q. I show you Plaintiff's Exhibit No. 85 in evidence, Mr. Haas (handing witness), and ask you

to examine these several items listed on that 1129
schedule and state whether or not in your opinion the several omissions and substitutions decreased the value of the building? A. They did not.

Q. How much experience had you in construction work or in the buying for construction work? A. Twenty-two years.

Q. Do you know in what respects, if any, the Central Park Properties Company put into that building things which were not required by the original plans and specifications? A. Well, I believe that everything that Mr. Banfield testified to would be the same as I would testify to in that 1130
respect.

Q. Have you made any detailed examination of the plans and specifications to determine what, if any, such changes were made? A. I did not.

Q. With special reference to the lighting fixtures, will you say whether or not the lighting fixtures which were purchased by you were of first quality? A. I would say they were.

Q. Do you know whether or not between June, 1929, and the time the electric fixtures were purchased, and other matters of equipment were purchased, there was any change in the cost of such materials? A. Prices began to drop just about a 1131
little after 1929. They started down; and in 1930 and in '31 and a portion of '32 they commenced to rise again.

Q. We are only interested down to 1930 and 1931. Were the costs of materials less in 1930 than they were in 1929? A. From late in 1930.

Q. The medicine cabinets, do you remember them, which you contracted for? A. Slightly.

Q. Were these medicine cabinets of a first quality? A. They were the same cabinets as were used, I understand, in the Savoy Hotel.

1132 Q. Were they of first quality? A. I would say they were.

Q. Do you know how much it cost the Central Park Properties to erect this building, as far as it went?

Mr. Schenck: I object to that on the ground that it is irrelevant and immaterial in this case.

The Court: Sustained.

Mr. Murray: Exception.

Q. Was it you who let all contracts? A. Yes, sir.

1133 Q. To contractors? A. Yes.

Q. And did you keep a record of the prices—of the contract prices of these contracts? A. Yes, sir.

Q. By erecting this building yourself or by the Central Park Properties erecting this building itself, instead of letting to a general contractor, how much money or how much percentage was saved, which a general contractor would receive?

Mr. Schenck: I object to that on the ground that it is irrelevant in this case.

The Court: Sustained.

1134 Mr. Murray: Exception.

Q. I show you now certain specifications which have been identified as specifications which were on the job during its construction (handing bound volume to witness). Did you ever see those specifications before—that particular book? A. Well, I might have seen it up on the working table or in the office of the building.

Q. Was this ever returned to your office after the Central Park Properties left the job? A.

Well, I can not specifically say whether that was. 1135
That was quite a lot returned, but whether that was or not, I don't know. It would not come to my direct attention anyway.

Q. How many sets of such books did you have? A. Just one.

Q. Just one? A. Yes.

Q. Was there not one or was there one at the office in addition to one at the job? A. I understood you to ask me about at the job.

Q. How many of these books were there in existence during the construction of the job? A. One set of specifications were filed by the building office at the job, and one was kept in our office— 1136
a signed copy.

Q. And do you know how many such specifications were in your office recently, of this type? A. The office copy that we have.

Q. And if this is the building job specifications, was that ever in your office (indicating)? A. I have not seen it since it has been at the job.

Q. Do you remember when it was that the Central Park Properties withdrew from the building? A. Yes, sir.

Q. When? A. Approximately about the middle of December, 1930. 1137

Q. Now, at that time was any request made or demand made for the return to the offices of Central Park Properties of all papers which were at the job in connection with the job? A. Yes, sir.

Q. Do you know, Mr. Haas, whether at or about the time that Central Park Properties withdrew from the job papers came from the job to the office? A. Yes, sir.

Q. Do you know whether any check was made to determine whether everything had come over

1138 which had been on the job? A. Well, that would be routine, and that would have been up to Mr. Banfield to do. He checks it up and sees that the papers are all returned.

Q. That was not your duty? A. No, sir.

Q. So you do not know as regards that? A. No, sir.

Q. Now, on or about December 15th or 20th, and after the withdrawal from this job, what was the status of the Central Park Properties? Did it still continue as a going concern? A. You mean the corporation?

Q. Yes. A. No, it was turned over to a cred-
1139 itors' committee by Mr. Lefcourt.

Q. And when it was turned over, were any of the papers in connection with the corporation turned over to that committee also? A. Yes, sir.

Q. Was there considerable confusion in the office after this occurrence? A. There was in the filing room.

Q. Can you tell whether there is now in existence at any place where you know all letters passing between Prudence Company and Central Park Properties? A. I would not know that. I imagine that some of them are still up in the Lefcourt of-
1140 fice, but I had very little to do with the filing of letters after they were once received.

Mr. Murray: I now offer in evidence a letter of January 19th, 1930, from Prudence Company to Central Park Properties (handing paper to Mr. Schenck).

(Marked Defendants' Exhibit L.)

Mr. Murray: That is simply a letter requesting the lobby details, your Honor.

The Court: Yes.

Q. Do you remember what you did in connection with that, Mr. Haas? A. Well, this letter would be referred back to Mr. Klein, and he would carry out the instructions. 1141

Q. I show you now a letter from Frank Grad to Mr. Haas, and ask you whether that refreshes your recollection regarding what transpired (handing witness)? A. Well, I would say that this letter would have taken the same course. This letter would have been referred by me to Mr. Klein, who would have handled that with Prudence.

Mr. Murray: I now offer in evidence this letter—January 21, 1930 (handing paper to Mr. Schenck). 1142

(Marked Defendants' Exhibit M.)

Mr. Murray: I now offer in evidence a letter from the Prudence Company.

(Marked Defendants' Exhibit N.)

The Court: Mr. Murray, have you a considerable number of letters that you are going to offer? If so, we can save time by your introducing all of them, and having them in the record now. 1143

Mr. Murray: Introducing all of them?

The Court: Yes, all that you have to offer, at one time.

Mr. Murray: Yes, I can do that. I now offer in evidence seven letters.

The Clerk: Shall I mark them as one exhibit, Judge?

The Court: Yes.

(Papers marked collectively Defendants' Exhibit O.)

1144 Mr. Murray: I would like to have your Honor glance at those letters (handing paper to the Court).

The Court: All right.

Mr. Murray: I do not want to seem to be too persistent, your Honor, but probably under Article 15 regarding changes in work, you probably had not considered the situation as it is; and that is that the Central Park Properties was at the same time the owner and the general contractor—if you wanted to make a comparison in that way; and that naturally in the ordinary case, where general
1145 conditions or general architectural conditions are used, an architect is contemplated, a general contractor is contemplated, and the ordinary owner does not himself construct his own building, but he employs an architect for the purpose of being his agent and making whatever contracts may be necessary with contractors. The owner, in such event, may or may not have very much to do with the work itself. He may never go near the work.

Now, in such event, since the architect is the owner's agent for that purpose, there is
1146 a provision put in that an architect may order extra work, for which the owner thereupon would be liable; or the architect may decrease the work, but in any event, in such case—in any such case, since the owner is the owner and the one to be satisfied, the owner has the right practically at will to change; and I say that that is applicable to this case here. The owner, the Central Park Properties, practically had the right to change at will, so long as, in good faith, it put up or erected a build-

ing which was sufficient security to the lender of money to it. 1147

The Court: Well, who passed on it? Did the owner have the exclusive right to determine that for himself?

Mr. Murray: As I read the specifications, yes.

(Colloquy omitted)

Mr. Schenck: If your Honor please, I realize that the construction that Mr. Murray is attempting to place upon these instruments is presented from the standpoint of rulings upon evidence, but it seems to us that it is— 1148

The Court: Of course, that does not take care of the matter of pleading.

(Further lengthy argument respecting construction of Article 15 omitted.)

Q. Now, I show you Plaintiff's Exhibit No. 76, and ask you whether you ever saw that or a similar document (handing witness)? A. Yes, sir.

Q. This document is dated December 5. Is that the date upon which you got the final advance? A. Part of it.

Q. How much did you get on that date? A. $225,000. 1149

Q. How much was remaining unpaid on that date, before you got that $225,000? A. $300,000.

Q. Now, for some time prior to December 5 did you have discussions with anybody in The Prudence Company regarding the obtaining of the final advance? A. Yes.

Q. And with whom were those discussions had? A. Mr. Braislin.

Q. Were there any discussions with anyone else than Mr. Braislin? A. After I was through with Mr. Braislin, with Mr. Henry Mark.

1150 Q. And who was Henry Mark? A. The attorney for The Prudence Company.

Q. Was he an officer of The Prudence Company? A. I believe he was a vice-president.

Q. And had you been referred to Mr. Mark by Mr. Braislin? A. Yes, sir.

Q. Were these discussions regarding the amount of money which should be paid to the Central Park Properties? A. With Mr. Braislin, yes.

Q. And what were those discussions? A. I made application to Mr. Braislin—that is, when I say "I", I mean through the comptroller of Central Park Properties,—for the final payment
1151 of $300,000. Several days after the application had been made to Prudence, word was sent in to my office that Mr. Braislin would only recommend quite a material cut of the $300,000. I had a telephone communication with Mr. Braislin that day, and he invited me over to his office in Brooklyn. I went over there, accompanied by Mr. Klien, of our employ, and Mr. Banfield—

Q. How long before December 5, approximately was that? A. About two weeks.

Q. Proceed. Did you go to see Mr. Braislin? A. I went to Mr. Braislin's office, and spent nearly the entire day with him and his department, and
1152 we got nowhere as to what he wanted to give us—to give me, and what I was ready to take; and I left his office; and the next time I was in communication with Mr. Mark—and he, in the meantime, as I understood from Mr. Mark, had been talking with Mr. Braislin—and Mr. Mark told me that they would make a complete inspection of the building, and that pending that inspection, we would wait until whatever time it took them—

Q. Did you agree to wait until that final inspection was made? A. Yes, sir. I was brought in

to—Mr. Mark telephoned me or, rather, I telephoned him each day, anxiously waiting for that inspection; and it finally drifted down to where Mr. Mark said that they would—that The Prudence Company would hold back $75,000 of the $300,000 payment, and led me to believe that that was what The Prudence Company required, and Mr. Mark said that that was all that was needed to complete the building. 1153

Q. Mr. Mark said at that time that $75,000 would have been sufficient to complete the building? A. Yes, sir.

Q. And what was your answer to that? A. I told him I thought it was over $50,000 excessive. 1154

Q. But did you agree to take or agree to allow them to keep the $75,000 for final completion? A. And whatever was left over we were to get back.

Q. Now, how much experience have you had, Mr. Haas, in connection with borrowings from surety companies and others for the erection of buildings? A. About twenty or twenty-five million dollars over the course of twenty years.

Q. And how many buildings have you had connection with on which building loans had been obtained? A. Possibly about eleven out of seventeen.

Q. What arrangement did you make with Mr. Grad as regards this particular job? A. The Central Park? 1155

Q. Yes. A. Mr. Grad's arrangement was to get a certain sum of money to draw a set of plans, draw the details and check shop drawings, and draw the specifications other than mechanical.

Q. Other than that, what authority was given to him by you? A. What authority was that?

Q. Other than what you have enumerated, what duties did he have to perform for you?

1156 Mr. Schenck: I object to that, if your Honor please, as involving a conclusion. If there is any agreement that was entered into—

The Court (Interposing): Well, that is what the question calls for.

Mr. Schenck: Yes.

The Court: What was the agreement?

The Witness: Just the regular architectural office duties.

Q. Was there any agreement that he should supervise the work? A. None whatsoever.

1157 Q. Did you know that he ever supervised the work? A. He never did, to my knowledge.

Q. To your knowledge were the specifications always prepared in Mr. Grad's office? A. Not completely, no. We completed them in our office.

Q. Do you know whether every specification upon which contractors worked ultimately received the approval of your office? A. They always did.

Q. And as the work progressed were there changes in the specifications from time to time? A. Yes, sir.

Cross examination by Mr. Schenck.

1158 Q. Just a few questions, Mr. Haas. You stated on your direct examination that a great many of your papers were in confusion after these matters were over. Do you have in your possession at the present time any papers which would show in any detail how much money Central Park Properties owed the contractors on this job on the 5th of December? A. I would not have that at all.

Q. What is your general remembrance of the approximate amount of money that Central Park

Properties owed contractors on this job on the 5th of December? A. I would not know the first thing of any financial condition of the Lefcourt Company or the Central Park Properties at any time. 1159

Q. Can you tell us how much, if any, of the $225,000 which you got from The Prudence Company on the 5th of December, was paid to contractors on this job? A. I would not know that, either.

Q. Did you at any time in your negotiations with Mr. Braislin for this final advance of the loan, represent to Mr. Braislin that you needed the money to pay contractors on the job? A. Yes, sir. 1160

Q. And at the time you made that representation, of course it was true? A. Yes, sir.

Q. You did need the money to pay contractors? A. Yes, sir.

Q. But you can not tell me whether or not any part of that $225,000 was paid to contractors on this job? A. I am quite sure a lot of it was paid to them, but the accounting department or the comptroller would have that information. I would not.

Q. Now, you said that you let every contract on this job? A. Yes.

Q. As I recollect your testimony. A. Yes. 1161

Q. Can you tell me whether, in general, the method of payment of the other contracts was approximately the same as the Gladstone painting contract; that is, one-half in notes, and one-half in cash? A. The majority of all the contracts were.

Q. Yes; and was the situation with regard to the painting contract approximately the same with regard to the other contracts; that is, that at the

1162 end of the job there were notes outstanding that were not met, and here was a substantial amount of cash due the contractors on the job? A. I think that was so.

Q. Yes. I show you now a letter from Central Park Properties to Frank Grad, dated the 16th of October, 1929, and I call your attention particularly to the signature "L. Haas", with a little initial below it, and ask you if that is your signature (handing witness)? A. It is not.

Q. Do you recognize whose signature it is? A. Well, I would recognize the dictation note.

Q. And whose initial is that? A. That would
1163 be Mr. Lush.

Q. You say that the little "l" is his signature? A. That I don't know. He is here and can testify to that.

Q. Yes. I am asking that because it characterizes quite a number of the other letters. A. Those are dictated out in the construction department, without my knowledge, but are signed with my name. They are dictated, and copies of those are usually put on my desk each morning.

Q. If I may be a bit general in this respect, Mr. Haas, the course of business indicated in this and similar letters is that the letter would be written
1164 in your name, but prepared by Mr. Lush? A. Or anyone else. Mr. Youngson might have written the letter—who was in charge of the mechanical department.

Q. I see from this letterhead that there are some 16 different corporations involved in the A. E. Lefcourt Realty Holdings? A. That is correct.

Q. And from their names, they seem to have some similarity to yours, Mr. Haas? A. Quite so.

Q. I assume you were involved in each one? A. Not financially, but just as an employee. 1165

Q. Yes. I am speaking of individually, so far as business cares and details are concerned? A. Correct.

Q. You were involved in a multitude of transactions in that period of time, were you not? A. Yes.

Q. And Mr. Banfield has stated that there were four or five construction jobs going on at the same time in the Lefcourt organization. That is your recollection, is it? A. Three of them were substantially completed, just finishing up, when the 59th Street job was started. 1166

Q. So far as your general business operations, Mr. Haas, were concerned, particularly when large amounts were involved, as a prudent man you attempted to have each important matter in writing or at any rate in memorandum form, did you not? A. I do not quite get the drift of that question.

Q. I have referred to the fact that your business affairs in that period of time were quite extensive? A. Yes.

Q. And involved large amounts? A. Yes.

Q. Your prudent business method of operation was to carry nothing of importance entirely in your memory, but to have, so far as possible, written memoranda and written agreements? A. I carried plenty in my head, sir. 1167

Q. I realize that; but so far as possible you put memoranda in writing, did you not? A. Wherever it was possible, yes.

Q. Yes. Now, there have been a number of changes in these plans and specifications referred to by Mr. Banfield. Can you tell us whether those

1168 changes in plans and specifications were incorporated in any writings which you are now able to produce? A. I don't recall any specific item that might have been contained in any memorandum. In general, a minor change that might have been made, I usually left it to the ability and intelligence of the construction and engineering department. If a change occurred that was of any great importance, or if we were to adopt a method in doing anything that had not been done before, it was always thoroughly investigated, and a conference generally was held in my office. If I approved it, I told Mr. Banfield or the head of that
1169 particular department to go ahead; and then they went outside in the mechanical room or construction room and changed the plans or added what we had agreed to do.

Mr. Schenck: I see. I now offer in evidence this letter of Central Park Properties to Frank Grad, dated the 16th of October, 1929.

(Marked Plaintiff's Exhibit No. 108.)

Q. Now, Mr. Haas, when you executed this bond—when the Central Park Properties, rather,
1170 executed this bond to The Prudence Company, did you, at the same time, enter into an indemnity agreement with a surety company? A. May I—

Mr. Murray: I object to that as immaterial and irrelevant, your Honor.

The Court: I sustain the objection.

Mr. Schenck: Your Honor will grant me an exception, please?

The Court: Yes.

Q. There has been some evidence taken in regard to letters written by a Mr. Race— A. (Interposing.) Mr. Who? 1171

Q. Mr. Race, of the surety companies. Did you ever receive, during the course of this job, any letters from these surety companies or did you, during the course of this job, ever write any letters to the surety companies, the defendants here? A. Nothing to my knowledge.

Q. Then, you do not recollect that any written inquiry had been made by these surety companies to Central Park Properties at any time during the entire course of this job? A. You mean regarding the construction work? 1172

Q. Regarding anything whatsoever? A. Well, let me explain that as far as the procuring of the bond or procuring of the loan or any financial or any buying or selling of property, or any leasing of property, I had absolutely nothing to do with it at all. Mr. Lefcourt attended to all that personally, and my own job was only construction work.

Q. So that, so far as you know, you never received any letter from the surety companies—from either of these surety companies in regard to the course or the stage of construction, during the entire course of the job? A. I personally never did. 1173

Q. Were you acquainted with any representative of the surety companies during the course of this job, Mr. Haas? A. I have never met anyone connected with the surety company.

Q. And this Mr. Race, of the surety companies, who is referred to as making certain telephonic communications in regard to the job, never telephoned to you? A. This is the first time I have heard his name.

1174 Q. There is a reference made in the correspondence—in the correspondence there has been shown a certain suggestion to Mr. Race that he obtain from Central Park Properties a copy of the certificate of occupancy. Did Mr. Race or anyone on behalf of the surety companies ever apply to you or to the Central Park Properties, so far as you know, for a copy of the certificate of occupancy? A. I can only answer for myself. Not to me.

Q. Not to you? A. No, sir.

Q. Now, at one time you came to Mr. Braislin and applied for the final advance of the loan, and
1175 asserted that you were entitled to that final advance because the certificate of occupancy had been issued, did you not? A. You mean the loan of December 5th that was talked about or the $85,000 that was due?

Q. I have reference to those four requisitions which you executed, that the final advance was due because the certificate of occupancy had been issued. A. Yes.

Q. And you reinforced your statement on the requisition with such argument as you could muster, that inasmuch as the certificate of occu-
1176 pancy had been issued, you were entitled to that final advance? A. That is correct.

Mr. Schenck: I think that is all.

Mr. Murray: That is all.

ANTHONY CLINCHY, called as a witness on behalf 1177
of the defendants, being first duly sworn, testified as follows:

Direct examination by Mr. Murray.

Q. Mr. Clinchy, what is your business? A. Plumbing and heating contractor.

Q. Are you or were you at one time connected with Charles Darmstadt & Company? A. Charles Darmstadt, Inc., yes.

Q. And were you connected with Charles Darmstadt, Inc., during the course of the erection of a building on 59th Street, which is now known as Essex House? A. I was. 1178

Q. What did you have to do in connection with the Darmstadt contract for plumbing and heating there? A. I estimated the plumbing end of it, and compiled the figures on the heating end, and submitted the estimate to the Lefcourt Company.

Q. After the contract was awarded to Darmstadt, what was your connection with the actual operation of the work? A. To supervise both the plumbing and heating installation.

Q. And did that take you to the building which was in the course of construction? A. It did.

Q. How often? A. Oh, four or five times a 1179
week.

Q. Do you know a gentleman named Walters? A. I do.

Q. Did you know him at that time? A. I met him after the closing of the contract.

Q. Did you meet him on this job? A. I met him in his office first.

Q. And where was his office? A. I think it was Remsen Street, Brooklyn.

1180 Q. And thereafter did you see him on the job at 59th Street? A. I did.

Q. Now, what, if any, conversations did you have with Mr. Walters regarding the heating work?

Mr. Schenck: That is objected to as incompetent.

The Court: Objection overruled.

Mr. Schenck: Your Honor will grant me an exception?

The Court: Yes.

A. Mr. Walters would generally meet me at the
1181 office of the Lefcourt Company, which was on the first floor of the building, and we would go our rounds in a sort of general inspection—he and another gentleman by the name of Schermerhorn, I think, if I am right—and we would discuss the general installation. If we saw something wrong, he would ask me to have the foreman correct it. It was the general inspection that goes on at any construction job.

Q. Was there any time when you and he discussed the question of radiators in interior bath rooms? A. That was just as we closed the contract.

1182 Q. Just as you closed the contract? A. Yes.

Q. Was that in his office at Remsen Street? A. In Brooklyn, yes.

Q. And what was the nature of that conversation? A. The specification—the original specification called for certain radiation to be installed in interior bath rooms; but there was an addenda to the specification that asked for its omission, and at the time of the closing of the contract Mr. Haas said that all these addendas and so forth would

have to be approved by The Prudence Company, and that that would be entirely up to a gentleman by the name of Mr. Walters, whom I was to see along with Mr. Klein, of the Lefcourt organization. We closed the contract subject to a price for omission of the radiation; and after a conversation with Mr. Walters at his office, I believe letters were written omitting the bath room radiation. 1183

Mr. Schenck: I object, and move to strike on the ground that it is incompetent in respect of an attempted waiver. I also move to strike it on the ground that reference is made, in the opinion of the witness, apparently to letters written on the subject. 1184

Mr. Murray: I consent to strike out the opinion.

The Court: Yes; and the last sentence of the answer I will strike, too. In other respects the motion is denied.

Mr. Schenck: Your Honor will grant me an exception?

The Court: Yes.

Mr. Schenck: My objection is directed to the conversation, on the ground that it is an attempt to prove a waiver in regard to certain features of the work through Walters, without showing his authority. 1185

The Court: That is the reason I struck out the last sentence.

Mr. Schenck: And without claiming any written waiver in accordance with the provisions of the bond.

The Court: Yes.

Mr. Murray: I understand that only the last sentence has been stricken out?

The Court: Yes.

1186 Q. When you bid on your contract, Mr. Clinchy, there were alternate bids, were there not? A. Yes.

Q. One which would include radiators for interior bath rooms, and one which would exclude them? A. Yes.

Mr. Schenck: In that respect, I think we should have those alternative features produced, rather than the witness's recollection with regard to them.

The Court: There is nothing objectionable in the question.

1187 Mr. Schenck: I move to strike any reference on the part of the witness to the contents of documents not produced or not accounted for.

The Court: Yes. I will grant that motion.

Q. I show you now this instrument and ask you, Mr. Clinchy, whether that is the contract which was executed between Darmstadt and Central Park Properties (handing witness)?

The Court: Look at the signatures.

A. Yes, sir.

1188 Mr. Murray: I offer that in evidence. That is the heating contract.

(Marked Defendants' Exhibit P.)

Q. Can you tell me by looking at this instrument, Mr. Clinchy, whether the alternate for radiation in interior bath rooms is contained therein, or whether it is excluded therefrom (handing witness)? A. I do not think there is anything here that mentions the bath room radiation, that I can see right offhand.

Q. Well, is it the practice— A. The specifications should govern that, and the addenda should be attached to the specification. 1189

Q. Now, when you were at Mr. Walters' office you mentioned a specification with addenda thereto. I show you now Defendants' Exhibit G in evidence, and call your attention specifically to the addendum No. 1 thereto, and ask you whether that is the addendum which you had in mind when you testified—the last page (handing witness)? A. Yes.

Q. And it specifically provided in that addendum, under F "Interior bathroom radiation: All radiation for interior bathrooms, together with the 1190 risers, valves, caps and so forth in connection with same, is to be omitted"? A. Right.

Q. Now, after that conversation with Mr. Walters in his office, did you afterwards see him on the job? A. Yes, and at our office.

Cross examination by Mr. Schenck.

Q. What was the date of this conversation with Mr. Walters? A. Oh, all through the life of the job, which was—

Q. (Interposing.) No. You have given a particular conversation with him at his office, in regard to this interior bathroom radiation. A. Oh, 1191 I must have had six or seven visits to his office.

Q. In all of which you had this conversation that you have been talking about? A. All sorts of conversations regarding the general construction.

Q. No. I mean this particular conversation that you have been talking about. A. At one of the times that I called at his office, yes.

Q. What is your best recollection of the date of this particular conversation? A. Possibly in the

1192 month of March, 1930; just right after the close of the contract.

Q. You say "possibly". Is that your best recollection? A. My best recollection now, yes.

Q. That is, you first made your agreement with Central Park Properties, Inc., as to the work that you were to do? A. Beg pardon?

Q. I say, you first made your agreement with Central Park Properties in regard to the work that you were to do? A. Yes, sir.

Q. And then you had this conversation with Mr. Walters? A. After the contract was practically consummated.

1193 Q. After the contract was practically consummated? A. Yes; then we were turned over to Mr Walters in Brooklyn.

Q. You say "practically consummated"— A. Yes.

Q. The date of the contract is the 6th of February, 1930? A. Right.

Q. There was no question about its being actually executed? A. Well, as far as that contract is concerned, it was signed on the 6th of February, yes; but it was subject to those addendums. If Mr. Walters was to insist upon it, we were to be paid for anything in the addendums.

1194 Q. You are speaking of that as a clause of your contract, are you? A. As an understanding with Mr. Haas.

Q. No. As a clause of your contract? A. Yes, it is a clause. The contract says—

Q. Will you point out any place where Mr. Walters is referred to in this contract? A. No, not Mr. Walters.

Q. Well, will you point out the clause in the contract to which you refer (handing witness)? A. We were to do certain work—

Q. No. Point it out in the contract. A. This 1195
contract calls for work of $600,000, exclusive of the addendas.

Q. Just point it out to me in the contract? A. Oh, I couldn't do that. The contract calls for the work without the addendas.

Q. And then you had a certain agreement with Mr. Haas, you say? A. Yes; the agreement was with the Lefcourt Company or Mr. Haas representing the Lefcourt Company.

Q. And that was an agreement that if Mr. Walters required it, you would do certain additional work? A. The agreement was—

Q. No. Was it that? A. Yes; if Mr. Walters 1196
required any additional work other than what our contract called for, the Lefcourt Company would give us an order, for instance, to install radiators, and if we were to put them in, we would be paid additional.

Q. Then, was that contract or that agreement that you had with Mr. Haas—was that in writing? A. I believe there was an estimate submitted to that effect.

Q. Have you got a copy of it? A. No. I have no papers on the job whatsoever.

Q. Was any reference made to it in any letter? 1197
A. Yes.

Q. By either— A. By the Darmstadt Company. They were all submitted to the Lefcourt Company.

Q. But you haven't got a copy of that either? A. No, we are out of business too. The Darmstadt Company is also out of business. It has been out of business for two years.

Q. I see. I am not asking for details, but speaking very generally, you know there was a certain

1198 amount of money that was not paid to you on this job? A. Yes.

Q. About how much was it? A. $185,000.

Q. Was that money due on the 5th of December, 1930? A. I guess 50 per cent. of it was due under an agreement. The other was to go along for a certain length of time.

Q. That is, 50 per cent, of the amount that you mentioned was due in cash on the 5th of December? A. About 50 per cent. I should judge.

Q. Did you know anything of this building loan agreement? A. No, sir.

Q. You did not know that there was a building
1199 loan agreement? A. No, sir, I did not.

Q. Did you know or hear rumors that the Central Park Properties was going to get $225,000 on the 5th of December? A. I think we had notice that they were going to receive some money. Mr. Haas acquainted us with that fact. Mr. Mayer, who was the secretary and treasurer of our corporation, and myself were acquainted with it.

Q. You did not get any of it? A. We did, yes.

Q. How much? A. I think, around $20,000.

1200 CUYLER W. LUSH, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination by Mr. Murray.

Q. What is your business, Mr. Lush? A. I am an engineer.

Q. Are you the Mr. Lush who has been mentioned during the trial here? A. I am.

Q. Were you connected with the Lefcourt organization at the time the building project at 59th

Street was in the course of erection? A. I was employed by the Lefcourt organization from about the middle of September of 1929 until about the end of September, 1930. 1201

Q. How long have you been an engineer? A. Twenty-nine years.

Q. With what organizations have you been connected? A. I have been connected with The Foundation Company, the Lefcourt Company, the Western Pacific Railroad, some municipalities—a number of them.

Q. And where are you now employed? A. I am employed by the Department of Correction at Clinton Prison, Dannemora. 1202

Q. As what? A. I am an engineer up there. I advise the warden in connection with construction operations, and I have charge of the work done by the inmates.

Q. All construction work is under your supervision? A. All inmate construction.

Q. Prior to your connection with the Lefcourt organization with whom were you connected? A. The Foundation Company.

Q. On or about September 24, 1929, the Central Park Properties obtained an agreement for a building loan from The Prudence Company. Prior to that date did you become connected with the Lefcourt organization, or was it just about that time? A. It was, I think, around the middle of September, 1929. That would be prior to September 24th. 1203

Q. Prior to that date and prior to the loan did you have any familiarity with the plans and specifications upon which The Prudence Company granted their loan? A. I did.

1204 Q. Were you connected with Mr. Grad in the doing of certain work? A. Yes, I was engaged by the Syndicate Subscription Corporation to work with Mr. Grad in developing the plans and specifications.

Q. And the Syndicate Corporation whose name appears on the original specifications; is that right? A. That is correct.

Q. These are the specifications, are they not, with which you had something to do (handing witness) prior to the Lefcourt organization obtaining the loan? A. Yes, these are the specifications.

1205

The Court: There is no doubt about these preliminary matters. There is no use wasting time with those.

Q. Did you have the greater part of the work of preparing these specifications?

Mr. Schenck: I think I must object to that. It is entirely irrelevant, here.

The Court: Did you assist in the preparation of them?

The Witness: I did.

1206 Q. How long did it take to prepare these specifications? A. Well, I think about two weeks. Possibly a little longer.

Q. Did you have anything to do with the preparation of mechanical specifications? A. Well, we had several consultations in connection with the mechanical specifications.

Q. When you went with the Lefcourt organization were you thoroughly familiar with the plan of the building contemplated by the original plans and specifications? A. Yes.

Q. Briefly tell us, Mr. Lush, what you did in 1207
connection with this project. A. You mean after I went with the Lefcourt organization?

Q. Yes. A. Well, after I went with the Lefcourt organization the first thing I did was to, I might say, present a picture to Mr. Haas of that which the Lefcourt organization took over from the Syndicate Subscription Corporation. That is, I tabulated all the sub-bids that the Syndicate Subscription Corporation had received from the various trades, and I am not sure whether I wrote a memorandum to Mr. Haas on the matter or not, but in any event I was present at conferences we had in the matter, so that a picture would be 1208
formed, as I understood it, in Mr. Haas's mind and Mr. Lefcourt's mind and they could make up their minds as to their general policy on the project.

Q. Had you prior to that time obtained estimates of the cost of erecting the building in accordance with these plans and specifications? A. Yes. That estimate had been obtained in two ways, I believe. So far as I am concerned we did get hold of a lot of sub-bids from various sub-contractors who had made bids to The Foundation Company and other people, and we tabulated them and ar- 1209
rived at the cost.

Q. And what was the total estimate to construct in accordance with those plans and specifications?

Mr. Schenck: I object as irrelevant and immaterial.

The Court: Sustained.

Mr. Murray: Exception. I am going to ask Mr. Lush the same question, Mr. Schenck,

1210 which I asked Mr. Banfield and Mr. Haas, regarding the value of the building without these things in here.

Mr. Schenck: I object to the question on the grounds previously urged, but I have no objection to the form of the question and I shall not object to Mr. Murray including all of the items or any that he chooses on Schedule B in one question to the witness.

Q. I show you Plaintiff's Exhibit 85, Mr. Lush (handing witness), and ask you to look at that and state whether or not in your opinion the fact
1211 that these items were not installed in the building decreased the value of that building?

Mr. Schenck: Your Honor will note my objection and exception.

The Court: Yes.

A. Decreased the value of the building from what standpoint?

Q. Well, did it decrease the value of the building from any standpoint? A. Well, it did not decrease the value of the building as security for a building loan. It might have decreased the cost of the building—did decrease the cost of the build-
1212 ing to the extent that those—

Q. Not cost, Mr. Lush, but in your opinion did it decrease the value of the building?

The Court: The witness asks you in what respect.

Mr. Murray: As security for a building loan.

The Court: He answered that in that regard it did not.

Q. Did you have anything to do, Mr. Lush, with 1213
the obtaining of bids and the letting of a contract for lighting fixtures? A. Well, Mr. Klein and I went around to a great many manufacturers of lighting fixtures—

The Court: Isn't this cumulative of what two other witnesses testified to?

Mr. Murray: That is true, your Honor.

The Court: I do not think we need anything more on that subject, do we? Unless you are going to add something to what they said.

Q. Do you know the Essex House as it now 1214
stands? A. I do.

Q. Assuming that after the Lefcourt organization withdrew from the work it was necessary to expend another hundred thousand dollars to complete the building, after the completion in that respect would you say whether or not the building as completed was as valuable or less valuable or more valuable than the building which would have been erected had the original plans and specifications been followed in every conceivable detail?

Mr. Schenck: I object to that as incompetent. 1215

The Court: Sustained.

Mr. Murray: Exception.

Q. Taking into consideration that there have been certain alterations in the ground floor of that building, the ground and basement floors, and that there have been added to the serving pantries certain gas ranges, but leaving these items out of consideration, is the building now as valuable as a building erected in strict accordance with these plans and specifications?

1216 Mr. Schenck: I object to that as incompetent.

The Court: Sustained.

Mr. Murray: Exception.

Q. Would it have been a simple or difficult matter, Mr. Lush, to erect a building, a first-class apartment hotel, on the premises in question, on the plans and specifications as originally drawn?

Mr. Schenck: I object to that on the same ground.

The Court: Sustained.

Mr. Murray: Exception. That is all.

1217 Mr. Schenck: No cross examination.

ALEXANDER C. YOUNGSON, called as a witness in behalf of the defendants, being first duly sworn, testified as follows:

Direct examination by Mr. Murray.

Q. What is your business, Mr. Youngson? A. Mechanical engineer.

Q. A little louder. What is it? A. Mechanical engineer.

1218 Q. Were you connected with the Lefcourt organization at the time of the erection of the building on 59th Street? A. I was.

Q. What connection did you have with the project? A. Mechanical engineer.

Q. And what did you do in that connection? A. I worked in conjunction with Mr. Kingsley in the preparation of the plans and specifications and then issued the plans for estimates, calculated the estimates for Mr. Haas, and then supervised the installation of the work.

Q. I did not hear the last part. A. Supervised 1219
the installation of the work at the building.

Q. Just what part of the building was the mechanical part; what did that include? A. Plumbing, heating, ventilating, electrical work.

Q. Do you remember that there was an addendum to the heating specifications eliminating radiators from interior bathrooms? A. I do.

Q. Do you know the inspector of The Prudence Company on that job? A. Yes, sir.

Q. What was his name? A. Mr. Schermerhorn.

Q. And did you see him there on the job from time to time? A. At least two or three times a week. 1220

Q. And what did you see him do on the job? A. Going around the different parts of the building, looking at the work.

Q. Did you see him inspecting the work? A. I did.

Q. And by "the work" do you mean the work in which you were interested particularly or generally? A. Both construction and mechanical.

Q. And did you see Mr. Schermerhorn there at any time when the floors only had cement between them, with the risers going to the upper floors? A. Yes, sir. 1221

Q. And did you ever see him inspect the risers? A. Yes, sir.

Q. Did you ever see him in the superintendent's office? A. Yes, sir.

Q. And what did you see him do there? A. Why, we would refer to the plans and specifications on any point in question; we would discuss the operation of the job or any points that we had to discuss for clearances, and so forth.

1222 Q. Did you have particular charge of the matter of the elevators? A. As far as the mechanical end of it is concerned; yes, sir.

Q. Did you have anything to do with the final inspection of the elevators as to their operation? A. Yes, sir.

Q. Do you remember being at the building shortly before the Lefcourt organization withdrew from it? A. I do.

Q. Do you know what the condition of the elevators was at that time? A. Practically completed, with the exception of one elevator.

Q. And what remained to be done on that ele-
1223 vator? A. Some of the enclosures, the doorways and so forth, on account of them having been used for a material hoist, it could not be completed as quickly as the others.

Q. What do you mean by "it could not be completed"?

The Court: Had not been completed, I suppose he means.

Q. Had not been completed? A. Sure.

Q. And what was required to be done before that would be completed, that elevator door? A. Some of the door operating equipment had to be
1224 adjusted, and so forth.

Q. Then would you say that the only work which was needed to be done to the elevator was a matter of adjustment? A. Yes, sir.

Q. And oiling? A. Yes, sir.

Q. Have you had experience before in connection with elevators and other mechanical equipment? A. Yes, sir.

Q. What would you say was the fair and reasonable value of work entailed in finishing that

elevator which you have described? A. Why, I should say for the adjustments and inspection, why, $2,500 would cover it. 1225

Q. With the use of that $2,500 you would have an entirely completed elevator system there? A. Yes, sir.

Q. Would you have any idea as to the reasonable value of removing and reinstalling pit equipment to permit waterproofing of a pit? A. Does that refer to just one elevator pit or—

Q. It refers to pits. I do not know how many pits there were. How many pits were there there; how many elevators, Mr. Youngson? A. Of course, you see in some pits you have two elevators, some of them single elevators. 1226

Q. Assume that the cost of waterproofing elevator pits was $225. Could you determine from that whether it was one or more pits? A. I should say it would be a single pit.

Q. Are you familiar with elevator pits, Mr. Youngson? A. Yes, sir.

The Court: And waterproofing elevator pits?

The Witness: Yes, sir.

The Court: What is the cost of waterproofing such an elevator pit as you find in the estimate? 1227

The Witness: Why, around $250.

Q. That would be for the waterproofing; is that right? A. Yes, sir.

Q. Is there included in that $250 the taking out and putting back in of pit equipment? A. Well, of course by taking out your pit equipment you might have to take out part of the roping on your elevators.

1228 Q. Then would you say whether or not $395 for doing that was reasonable or unreasonable? A. I should say it was reasonable.

Q. Were you familiar with the ice refrigerating system, Mr. Youngson? A. Yes, sir.

Q. There is a claim here that the compressor was repaired. Prior to Central Park going off that job will you state whether or not the refrigerating system had been completed? A. It had been completed and ran for several days in an operating test.

1229 Mr. Schenck: I thought that Mr. Murray had admitted these items. I thought yesterday you stated that the only items you questioned were the elevator matter and the painting matter.

The Court: But there is something about reasonable value.

Mr. Murray: Yes. I do not think I admitted it.

Q. After this installation had been completed and the testing, was the refrigerating system in every respect a perfect system? A. Yes, sir.

1230 Q. So that when the Central Park Properties went off that job there was no necessity for the repairing of a compressor? A. No, sir; it operated satisfactorily for several days.

Cross examination by Mr. Schenck.

Q. This estimate of yours of $2,500 to fix the Otis elevators—of course, the work on a patented article is a thing that has got to be done by the Otis Elevator Company, isn't it? A. Yes, sir.

The Court: Are you asking him as a matter of law or as a matter of mechanics? 1231

Mr. Schenck: Just as a matter of mechanics.

Q. And the only people who could properly put an Otis elevator in operative condition and finish the job were the Otis elevator people, weren't they? A. I would not say so exactly; no, sir. Any good elevator mechanics—

The Court: I do not know why that should not be so.

Q. They were the most appropriate people, at any rate? A. The most appropriate, yes. 1232

Q. How did you arrive at $2,500 as a fair price for putting this elevator system in perfect operative condition? A. Because the majority of the work was completed as far as adjustments were concerned and there was only just a little touching up to do, and oiling and greasing.

Q. You had never done that work yourself? A. I have not done that work myself, but I have seen it done for a number of years.

Q. In regard to the Otis elevator machinery and equipment you have never gotten anybody else except the Otis Elevator people to do the work, have you? A. At any time we let a contract to the Otis 1233 Elevator Company to install elevators they completed the job.

Q. So your estimate of $2,500 here is really predicated upon somebody else other than the elevator people doing the work? A. No, sir.

Q. You think they should have done it for $2,500? A. Yes, sir.

Q. And the fact that they did it for $14,000 you think is unreasonable? A. I certainly cannot see that value of work there.

1234 Q. How long have you been with the Central Park Properties or the Lefcourt organization, Mr. Youngson? A. I started with the Lefcourt people April, 1929.

Q. Do you know whether or not Mr. Walters who has ben referred to here was in the employ of the Lefcourt organization before he came into the employ of The Prudence Company? A. I understand he was.

New York, May 14, 1934.

1235 10.30 A. M.

TRIAL RESUMED.

Mr. Murray: If your Honor please, in reading over the minutes I noticed that there was a statement therein to the effect that a certain discussion we had regarding the admissibility of certain evidence did not take care of the question of pleading.

The Court: Did not what?

Mr. Murray: Did not take care of the question of pleading.

The Court: Oh, yes.

1236 Mr. Murray: Now, in view of the fact that there may be some question about the propriety of the pleading, I now desire to make a motion to amend the answer, if there is any doubt about the necessity of pleading separately in order to prove what I have in mind.

I have indicated at different points during the case, at different places during the case that I claimed that Prudence Company suffered no damage, if they received a building which was suffi-

cient security for their loan. I relied upon my general denials in the answer of any damage sustained by the Prudence Company. In other words, they alleged that there were certain incomplete items, which we denied. 1237

They alleged certain omissions and substitutions, which we denied; they alleged that the value of the building was decreased, which we denied; and in their second cause of action alleged the foreclosure of the mortgage.

Now, I have been proceeding upon the theory that under my general denials it was open to me to show by proof that, regardless of what the fact was as alleged by them, they suffered no damage because of the fact that the premises were sufficient security for their mortgage. 1238

Now, if there is any question about my ability to prove that fact under general denials, then I should like to amend the answer to set that up as a separate defense.

The Court: I think there is a good deal of question about your right to do it, in the light of the pleadings. I did permit you to adduce from witnesses the statement that the omission of these items did not damage the building, and that it was worth just as much without them as with them; but I do not think you can go any further than that. 1239

Mr. Murray: Then, I make the formal motion to amend the answer by pleading as a separate defense that even though there were these incomplete items alleged in the complaint, and the omissions and substitutions alleged in the complaint, that, nevertheless, the value of the building was sufficient security to protect the plaintiff on its mortgage.

1240 The Court: I will now hear Mr. Schenck.

Mr. Schenck: I do not want to oppose this application to amend on any technical ground. From the form in which the application to amend is made, however, it seems to me that it is bad in law,—the proposed amendment being that, despite the incompletions and despite the discrepancies, the building was sufficient to be security to the mortgage. That question of fact is entirely irrelevant on our contention under a completion bond.

I, therefore, oppose the amendment on the ground that it is legally insufficient.

I further oppose the amendment on the ground
1241 that, regardless of this limited form in which it is advanced, it is obviously made for the purpose of offering in evidence a multitude of building details in respect of which the defendants claim that the value of the building was in those respects increased, despite the decrease in the value by reason of the details made the basis hitherto of this litigation. In that respect I must claim unfairness on the part of the defendants, they having amended their answer at least four times to date, and three of those amendments being made the basis of various motions on the pleadings.
1242 They have given no excuse for not making this proposed amendment earlier; and I further submit that the defendants joining issue on such intricate matters of fact, after the plaintiff's case is in, and when it is in the midst of trial, is impossible. We can not now investigate the truth or falsity of these claims, and we have no opportunity to meet them.

I furthermore urge that the defendants should be precluded from making any such amendment

at the present time because of their suppression of the Switzer report. 1243

The Court: What is the Switzer report?

Mr. Schenck: The Switzer report is this report made by Keeler, Inc., through Mr. Switzer, after thirty days' investigation.

The Court: I shall deny the motion, Mr. Murray.

Mr. Murray: Exception.

ARTHUR JACOBS, called as a witness on behalf of the defendants, being first duly sworn, testified as follows: 1244

Direct examination by Mr. Murray.

Q. With what concern are you connected, Mr. Jacobs? A. Lightolier Company.

Q. And how long have you been connected with the Lightolier Company? A. Twenty-two years.

Q. Can you state what the volume of business done by the Lightolier Company is and has been over a period of years, in comparison with other electric fixture manufacturers? A. I daresay that our company does more business than any other company in the lighting fixture field.

1245

Q. During your connection with the Lightolier Company has that concern furnished electric equipment to apartment hotels? A. We have.

Q. And are you acquainted with the type and quality of the electric fixture equipment in the hotels in the City of New York? A. I am.

Q. Did the Lightolier Company obtain a contract from the Central Park Properties Company

1246 for the installation of the electric fixtures in the building now known as the Hotel Essex? A. We did.

Q. How did you come in contact with the Central Park Properties in that connection? A. Why, we solicited the business—go after the business in the regular way. We have an outside salesman in the territory who upon receiving a building report from me as the sales manager follows up each particular operation until we reach a stage where we interest the prospective buyer in our merchandise.

1247 Q. After your first contract with Central Park Properties were you informed that you would have an opportunity to bid when the time arrived for the— A. We did.

Q. (Continuing.) For the making of a contract? A. We did.

Q. Ultimately were you requested to bid on the contract? A. We were.

Q. What did you do so far as examining the building and arriving at a knowledge of the type of building before making your estimate to the Central Park Properties? A. We studied the plans, as is customary, and figured in our own

1248 minds what we thought would be the proper selection of lighting fixtures for that particular operation.

Q. And did you thereafter show these fixtures to representatives of the Central Park Properties? A. We did.

Q. And where did you show them? A. At our showrooms.

Q. You ultimately received the contract? A. We did.

Q. And that contract was for the furnishing of electric fixtures above the first floor; is that correct? A. Correct. 1249

Q. Did you also bid on electric fixtures for the first floor? A. We did.

Q. Did you obtain that contract? A. We did not.

Q. Were the samples which you submitted to the Central Park Properties for installation above the first floor fixtures usual and suitable for such a type of building as the Hotel Essex? A. They were.

Q. Were the fixtures which were subsequently installed the usual fixtures installed in such a building? A. They were. 1250

Q. Do you know how they compare in quality and type with electric fixtures in other similar hotels in the City of New York? A. Very favorably.

Q. Assume that you were requested to install in this building electric fixtures costing $50,000. Would you say whether or not those fixtures would be suitable to such a building, or appropriate for such a building?

Mr. Judd: I object, your Honor.
The Court: Sustained. 1251
Mr. Murray: Exception.

Q. Did you mention what the price bid by you for the electric fixtures on the first floor was? A. I didn't up till now.

Q. What was that price?

Mr. Judd: I object, your Honor.
The Court: Sustained.
Mr. Murray: Exception. That is all.

1252 *Cross examination by Mr. Judd.*

Q. Mr. Jacobs, you spoke of these fixtures as being the usual fixtures for such a hotel. A. That is right.

Q. Do I understand that there are standard fixtures for apartment hotels? A. Standard type.

Q. Do you have one type of fixture which you sell for apartment hotels? A. Not in design, I might say, but in quality about the same thing, yes.

Q. Do you have in your showrooms fixtures of various qualities and various designs? A. We
1253 have various designs and various qualities.

Q. Do the prices vary with the design or the quality? A. Naturally.

Q. And what determines the price of a fixture in general? A. The amount of labor that may be put into it; the manufacturing of it.

Q. Have you the contracts here under which you furnished the fixtures for this hotel? A. Yes, I think I have.

(Witness leaves stand and returns.)

Q. May I see it? A. (Witness hands Mr. Judd paper.)

1254 Q. I see in this contract, Mr. Jacobs, numbers with reference to the units. Do these refer to particular styles of equipment? A. They do.

Q. Can you tell me in general whether the styles listed there are the best which you could have furnished for this hotel? A. The styles listed here are the best that we could have furnished in this type of job, I would say.

Q. If you had been paid more could you have furnished a different type? A. Well, we could

have—naturally, we could have furnished something that cost more if we were paid more. 1255

Q. Have you with you the correspondence which preceded the— A. I have not.

Q. Were there any letters between you and Central Park Properties? A. No.

Q. Prior to the entering into of the contract? A. No letters. It was all done by personal contact. Most of it was handled by personal contact.

Q. With whom? A. With the Lefcourt people and with us, by bringing them down to our showrooms and showing them what we had set aside for this particular operation.

Q. And did you show them various fixtures? A. 1256
We grouped what we thought would be the most appropriate fixtures for that job into one room and showed them the entire layout. That is the procedure.

Q. In determining what would be most appropriate you had in mind the amount of your bid, I take it? A. Well, we did not have any particular amount in mind. Our first object was to get the appropriate fixtures there.

Q. Had you made your bid before the fixtures were shown to the— A. Oh, no, because we cannot make bid unless the selection is final and def- 1257
inite. We never make a bid until Mr. Haas or whoever else made the selection either said, "Well, I like this" or "I don't like it". When they say they like it, then we go to work on that selection and figure that up.

Q. You spoke, Mr. Jacobs, of comparing the fixtures in this hotel with those in other apartment hotels in New York. Was the Savoy-Plaza among those which you had in mind? A. No, I

1258 had in mind hotels of a similar nature, the same type. For instance, we did the Park Central Hotel of New York.

Q. Do you consider the Savoy-Plaza Hotel of the same type as this one? A. No, I would consider the Savoy-Plaza Hotel a little better in type than this one.

Q. Would you consider the lighting fixtures of the Savoy-Plaza a little better than the lighting fixtures in this one? A. Not better. More expensive, perhaps.

Q. More in keeping with the Savoy-Plaza? A. Well, more expensive. I mean there is no limit
1259 to what you can put into lighting fixtures if you feel so inclined.

RICHARD PLAUT, called as a witness on behalf of the Defendants, being first duly sworn, testified as follows:

Direct examination by Mr. Murray.

Q. Mr. Plaut, with what concern were you connected in 1930? A. Black & Boyd Manufacturing Company.

Q. What line of business was Black & Boyd in?
1260 A. Design and manufacture of lighting fixtures.

Q. Did Black & Boyd make a contract with Central Park Properties for the installation of first floor fixtures in the building now known as the Hotel Essex? A. They did.

Q. And prior to making that contract did you examine to see what type of building the Hotel Essex was, before submitting samples to Central Park Properties? A. Certainly.

Q. And did you display those samples to Central Park Properties? A. No, we submitted designs for the public rooms. 1261

Q. In other words, these particular fixtures were not what might be called standard fixtures? A. Not at all. They were specially designed and specially made.

Q. And were the designs which you drew and the fixtures which you subsequently manufactured in accordance with those designs the usual fixtures installed in a building of the type of the Hotel Essex? A. They were.

Q. What was the contract price in the contract for the installation of those fixtures? A. To the best of my recollection it was $8,600. 1262

Q. Is Black & Boyd still in existence? A. No, they were liquidated last year.

Q. Liquidated last year? A. Yes.

Cross examination by Mr. Schenck.

Q. Mr. Plaut, how long was Black & Boyd in existence? A. About forty years.

Q. Have you got the contract with you? A. No, I have not. When the company was liquidated certain records were destroyed, and I believe those were amongst them.

Q. Did you have charge of this negotiation yourself? A. I did. 1263

Q. Was there any correspondence on the subject? A. No, it was all done by personal negotiation.

Q. Did your concern install the lighting fixtures in the Savoy-Plaza Hotel? A. No, we made certain lamps for the various upstairs suites; table lamps.

Q. Nothing on the first floor, though? A. No.

1264 The Court: What is the point in reference to the Savoy-Plaza?

Mr. Schenck: There is some reference in the early correspondence that the Savoy-Plaza was a rather test comparison. Mr. Lefcourt lived at the Savoy-Plaza.

The Court: Correspondence between whom?

Mr. Schenck: Correspondence between The Prudence Company and Lefcourt. I am not pressing it in any detail, however.

Q. What was the course of negotiations by which the price of $8,000 was arrived at? Were your first designs that you submitted accepted?
1265 A. Not in toto. There are always revisions and changes made.

Q. No, I am asking in this particular instance, Mr. Plaut. Were there in this particular case revisions? A. Oh, yes.

Q. What was the first price; what was your first estimate? A. I don't remember exactly. Very close to the final price.

Q. And you do not remember whether the final estimate was above or below the first estimate? A. I believe it was slightly below.

1266 WILLIAM O. WHITNEY, called as a witness on behalf of the Defendants, being first duly sworn, testified as follows:

Direct examination by Mr. Murray.

Q. Mr. Whitney, what concern were you connected with in 1929 and 1930? A. Brunswick-Kroeschell Company.

Q. Did the Brunswick-Kroeschell Company 1267
have a contract for the installation of a refrigerator equipment and system in what is now known as the Hotel Essex? A. They did, yes.

Q. Were you familiar with the installation of that equipment? A. I was.

Q. Was there any testing of that equipment made after it was installed? A. Yes.

Q. And were you present at that testing? A. I was not.

Q. Did you at any time examine that equipment after its installation? A. Yes, I have seen it since.

Q. When was that work completed, if you re- 1268
member? A. The plant was completel in October, 1930, and we notified Lefcourt's office that we were ready to run the test, on October 21st, I believe.

Q. From your examination and inspection of that system would you say whether or not the system was entirely complete and adequate at the time you left it there? A. Entirely so.

Q. And when you left there was there any necessity for any repairing to be done to a compressor or to any other part of that system? A. No.

1269

Cross examination by Mr. Schenck.

Q. Mr. Whitney, were you paid in full for your work? A. We were paid almost in full. We have a note, I believe, now for the balance.

Q. Do you happen to know how much that note is? A. It is roughly $2,100, I think.

Q. And what was the amount that you were paid? A. I could refresh my memory.

1270 Q. No, just generally. A. I think it was in the neighborhood of $12,600; something like that.

Q. When was the last time that you in charge of this negotiation saw this system? A. Well, I have been up there even recently on other work.

Q. I quite realize that, but I mean in regard to the system as you installed it. You were not there at the test? A. No, I was not. You see, the mechanics run a test, get the temperatures in the refrigerators, and they pull the amount of ice that was specified in this case.

Q. And what was the date nearest to the test that you were there?

1271 The Court: Is that subsequent to the test?

Mr. Schenck: No, before the test.

A. That I would not be able to tell you now. I could not tell you. That is only one of a great many jobs.

Q. Of course. A. And I would not be able to recall.

Q. What was the date nearest the test, after the test, that you were there? A. Well, I don't believe I could help you out very much there.

Q. When did you last see this system? A. Oh, within the last three or four months. We have

1272 done other work in connection with other changes up there. For instance, they recently put in—

Q. No, I do not think we are interested in that. A. (Continuing.) —a new restaurant and such things as that.

Mr. Schenck: I do not think we are interested in that. That is all.

DUNCAN MCNICOL, called as a witness on behalf of the defendants, being first duly sworn, testified as follows: 1273

Direct examination by Mr. Murray.

Q. With what concern are you connected, Mr. McNicol? A. S. H. Pomeroy Company, Inc.

Q. And what business do they have? A. Manufacturers of metal windows.

Q. Did the Pomeroy Company have a contract with Central Park Properties for the installation of metal windows in the building now known as Hotel Essex? A. They did.

Q. Is there any particular in which the metal windows manufactured by Pomeroy are different from the metal windows manufactured by other manufacturers? A. Well, the design of the Pomeroy standard type window, which was installed in the Essex House, is designed along the lines of a wood window; and it is especially adapted to that particular type of building. Also in conjunction with our window we have an integral weather flange, which obviates all necessity of calking. 1274

Q. And just what is a weather flange, and how is it placed in such a window? A. It is a part of the jamb; that is, the weight box and the head of the window, and it is built right into the masonry. 1275

Q. In your opinion, with this weather flange on your windows, is it necessary to do any calking of exterior windows?

Mr. Schenck: I object to that on the same—

The Court: What is the purpose of it?

1276 Mr. Murray: They claim that calking was necessary, your Honor, and one of their claims of damage is that the windows were not calked.

The Court: Is that in Schedule B?

Mr. Schenck: No, your Honor; Schedule A—an actual expense of ours to do this calking.

The Court: Objection overruled.

Mr. Schenck: Exception, if your Honor please. We are really confronted by the opinion of a salesman with regard to work that we found it necessary to do.

1277 The Court: If the ground of objection is that the salesman does not know and is not qualified, that is another matter.

Mr. Schenck: My objection is that this actual expenditure of calking is not met by the opinion of anybody. It is an expense which we found necessary to incur; and therefore, that expenditure is not to be qualified by the opinion of this salesman, who has never seen this work, but who thinks that his windows never need calking.

The Court: Just qualify the witness.

1278 Q. How long have you been with Pomeroy? A. About ten years.

Q. Are you familiar with the manufacture of these windows and the installation of them? A. Yes, sir.

Q. Just what have you done during those ten years for the Pomeroy Company? A. Well, I worked in various capacities. I did estimating work, supervised installation work, and more recently handled all the construction details between the contractor's office and our own.

Q. Are you familiar and have you been familiar with the installation of the windows themselves? A. Yes, sir; I have supervised that work. 1279

The Court: All right. I will overrule the objection, Mr. Schenck. Now, was calking necessary?

Q. Yes, in your opinion was calking of these windows from the outside necessary? A. No, sir.

Mr. Murray: That is all.

Cross examination by Mr. Schenck.

Q. Mr. McNicol, when did you last see these windows? A. Shortly before the job was completed. 1280

Q. And when was that? A. Oh, that must have been early in 1930.

Q. How early? A. How were they?

Q. No; how early in 1930, I say? A. Oh, I don't recall exactly. I just recall—of course we do hundreds of jobs in the city, and I just recall visiting this job when it was pretty well completed.

Q. Before you testified here you refreshed your recollection as to the facts and circumstances, did you not? A. On this particular job?

Q. Yes? A. No, I don't think so. 1281

Q. Did you examine the contract under which these windows were put in? A. Yes, sir.

Q. Have you got that here? A. Yes, I have a copy of it.

Q. Could you show it to me, please? A. Yes, surely.

Q. And any correspondence in regard to it. A. Yes.

(The witness left the stand and immediately returned with an envelope of papers, and handed some papers to Mr. Schenck.)

1282 Q. Now, this contract that you have shown me is dated January 4, 1930. Approximately how long did it take you to install these windows? A. Well, they are installed as the building is erected. In other words, as the brick work goes up, the windows are built right into the brick work.

Q. So that it is early in the stage of construction, as the building is being enclosed? A. They will start in when the brick work is going up on the first floor wall, and the first floor windows are installed; and when they reach the twentieth floor, the twentieth floor windows are installed.

Q. Could you say there having been given some
1283 proof here that this building was completely enclosed in June, 1930, that all your windows had been installed in June, 1930? A. Well, the job, at the time I last visited it, they were plastering most of the floors; and at that time the job was pretty well along.

Q. And would you say that was about in June, 1930? A. I could not say just what month it was or what time of the year.

Q. Between that time and this you have not seen those windows? A. No, I have not.

Q. And you did not see them after the plaster had been completely put around the windows? A.
1284 Oh, yes.

Q. Did you? A. At the time I was at the job, yes.

Q. And how long after the plaster had been completely put around the windows did you see the windows? A. Well, they were doing the plastering work at the time—some of it.

Q. So that the plaster was not complete the last time you saw them? A. Not in the entire building.

Q. You say you installed these windows. In your entire experience with S. H. Pomeroy & Company have you ever done any calking? A. We have on rare occasions. 1285

Q. That is, you have when necessary— A. No.

Q. (Continuing.) Calked your windows? A. No. In certain buildings an architect will insist on calking the windows.

Q. And then you will do it? A. That is right. It is sublet.

Q. You sub-contract the calking? A. That is right.

Q. And when an architect calls for calking, you do it? A. That is right. 1286

Q. Have you ever found it necessary to calk your windows when they are in towers or when the facade is exposed? A. No, sir.

Q. You never find that necessary? A. No, sir.

Q. Then, in your opinion, it is not necessary to calk them? A. If it were, we would be advised of it by the contractor—that there was leakage at the building, and we would be glad to make an examination of them.

Q. And then you would go and do the calking? A. We have never found it necessary. We have never been called upon to do it.

1287

Q. You have never been called upon to do that at all? A. No.

Q. And you have sub-contracted the calking of your windows? A. On rare occasions.

Q. Where the architect required it? A. That is right.

Mr. Schenck: That is all.

(Witness excused.)

1288 JOSEPH FEYTEL, called as a witness on behalf of the defendants, being first sworn, testified as follows:

Direct examination by Mr. Murray.

Q. Mr. Feytel, with what organization are you connected? A. Alef Corporation.

Q. And what is the Alef Corporation? A. A trusteeship.

Q. A trusteeship for what? A. For the benefit of Mr. Lefcourt's creditors.

Q. And just what do you mean by that, Mr. Feytel? A. The Alef Corporation was formed
1289 and took over all of Mr. Lefcourt's remaining assets and liabilities, with the intention of paying off all these contractors.

Q. Now, is there among the Alef files a contract between the Otis Elevator Company and the Alef Company regarding the payment of the contract price for the elevators at what is now known as Essex House? A. Well, there is an agreement between Alef Corporation and the Otis Elevator Corporation in regard to the payment of the balances due them on these various companies.

Q. May I see that? A. Yes (handing Mr.
1290 Murray).

Mr. Murray: I offer in evidence an agreement between the Alef Corporation and Otis Elevator Company (handing paper to Mr. Schenck).

(Paper marked Defendants' Exhibit Q.)

Q. What payments, if any, were made by this Alef Corporation to Otis Elevator Company? A. Twenty and one-half per cent. of the remaining balances as we took them over.

Q. Is there anything showing when this contract 1291
was made between Otis Elevator Company and the Alef Corporation? A. April 15, 1931.

Q. Does that show the date when that was made? A. Between Alef and Otis, yes.

Q. Have you got any figures to show what was due and owing to Otis Elevator Company on its original contract on or about December 16, 1930? A. Yes, sir. Central Park Properties—the Otis Elevator's claim against Central Park Properties was $80,440.83; and that amount with various amounts on other companies gives a grand total of—

Q. That amount and what? A. That balance 1292
and the balance on other companies of Lefcourt's totalled $135,000, which is agreed upon in that agreement.

Q. And what was the original contract price of the Otis contract? A. $215,000.

Mr. Murray: That is all, Mr. Feytel.

Cross examination by Mr. Schenck.

Q. Of course, these figures that you have given us have been gotten from the Otis Elevator Company, have they not? A. No. They have been taken from the Lefcourt records. 1293

Q. Oh, I see. Without going into the terms of this agreement, Mr. Feytel, it is shown in evidence in this case that in the early part of January, 1931, Otis Elevator Company filed a conditional bill of sale against this particular building, and that Central Park Properties called the attention of these two surety companies, the Fidelity & Deposit Company of Maryland and the American Bonding Company, to that fact—rather, The

1294 Prudence Company called that fact to the attention of these two surety companies, and they wrote a letter that they would take care of it immediately. In any of your dealings in this matter did you find that the surety companies had done anything with regard to that conditional bill of sale or done anything in regard to that indebtedness of Central Park Properties to Otis Elevator Company? A. I have no knowledge of that.

Mr. Schenck: That is all.
(Witness excused.)

1295 DAVID KRAUS, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination by Mr. Murray.

Q. Mr. Kraus, what is your business? A. Carpenter contractor.

Q. Are you the gentleman who had a contract with Central Park Properties for the doing of certain carpentry work on the building now known as the Essex Hotel? A. Yes, sir.

Q. When did you complete your work? A. De-
1296 cember 5, 1930.

Q. And when did you start your work? A. May 5, 1930.

Q. Did you know Mr. Henry Mark in his lifetime? A. Yes, sir.

Q. Did you prior to December 5, 1930, see Mr. Mark at the building? A. Yes, sir.

Q. And did you have a conversation with Mr. Mark at that time? A. Yes.

Q. And what was that conversation? A. Well, first, Mr. Henry Mark and myself, we were very

friendly, and we talked about other private business. Before he left he asked me my opinion how much the building is finished, so I said it is practically finished, with little odds and ends to be done yet. 1297

Q. Did he say that he had come up to the building for any purpose? A. Well, he just said that he never goes to building, but at this particular time he just wanted himself to prove to himself how far the building is progressed.

Q. Prior to December 5, 1930, how often were you on the job? A. Every day.

Q. And for a period of two weeks before December 5, 1930, did you see any inspector of The Prudence Company on the job? A. One particular inspector I saw almost every day—Mr. Schermerhorn. 1298

Q. And did you see any other inspector? A. I saw Mr. Billsborrow quite often.

Q. Now, I am talking specifically of the two weeks before December 5, 1930. What inspectors in addition to Mr. Schermerhorn did you see on the job during those two weeks? A. There were quite a few—about three or four, including Mr. Billsborrow, who were going around the building and checking off things. 1299

Q. What did you notice them do? A. Just writing down in books and checking.

Mr. Murray: That is all.

Cross examination by Mr. Schenck.

Q. You did not follow them around, did you, Mr. Kraus? A. No, sir.

Mr. Schenck: That is all.

(Witness excused.)

1300 Mr. Murray: I will recall Mr. Banfield to the stand, if I may, your Honor, for some additional questions.

The Court: Yes.

ROBERT P. BANFIELD, recalled:

Direct examination by Mr. Murray.

Q. Mr. Banfield, is there more than one way in the construction of a building of providing for means of keeping a carpet on the floor? A. There is.

1301 Q. And what are those ways? A. One particular manufacturer has a way of glueing it; to put down strips and nail the carpet to them; or you can plug the floor; that is, drill holes in the floor, and insert wooden plugs, for the purpose of nailing the carpet down.

Q. What is the Kellastone manner? A. The Kellastone manner is a continuous strip around the room, for the purpose of nailing.

Q. And what manner did the Lefcourt organization contemplate using for the fixing of carpets on the floors?

1302 Mr. Schenck: I object to that—what they contemplated.

The Court: Do you mean the specification or what they had in contemplation? That is a pretty broad term. Either what they did or what specification provided may be relevant.

Mr. Murray: Well, the time never arrived for them to actually put any—

The Court (Interposing): I sustain the objection.

Mr. Murray: Exception.

Q. Now, what is this sanitary cove in a cement base? A. It is a means of putting a cement base to eliminate a square corner. The corner is rounded off for sanitary purposes, to keep dust and dirt from accumulating in the corner. 1303

Q. And what is the appearance of that? A. I can draw it for you better than I can tell you.

Mr. Schenck: There is a drawing of it on the board now.

The Witness: Well, that is not so good, I think. There is a well, and there is a floor (marking on blackboard). An ordinary cement base is something like that (indicating). Now, there is the wall, and there is the floor (marking on board), and a sanitary cove base is installed like that (indicating). 1304

Q. So that is it a fact that where the carpet would come closest against the wall, there is a curve? A. That is correct.

Q. And will the carpet lay flat both against the floor and against the base? A. When you have a sanitary cove there is practically no means of determining the exact point to stop the carpet. In other words, it can not butt up against a flat or vertical surface.

1305

Q. You saw the building or did you see the building shortly prior to December 20, 1930? A. I did.

Q. I show you now Plaintiff's Exhibit No. 84—

The Court: That is Schedule A?

Mr. Murray: Yes, Schedule A of the complaint, Mr. Banfield, and ask you whether you are familiar with the different items of work

1306 mentioned on that schedule (handing witness)?

The Witness: I am.

Q. How long in your opinion would it have taken to have completed these different items listed on Schedule A? A. Between four and eight weeks.

Mr. Murray: That is all.

Mr. Schenck: No questions.

(Witness excused.)

1307 ANDREW G. SCHNEIDER, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. Murray.

Q. Mr. Schneider, what is your position with the Fidelity & Deposit Company of Maryland? A. Assistant secretary.

Q. And were you assistant secretary in March, 1933? A. I was.

Q. I show you an original amended answer in this action, and ask you whether that is your signature thereto (handing witness)? A. Yes, it is.

1308 Q. I now call your attention particularly to paragraph 12 of that answer, and ask you from whom you received the information upon which that statement was based (handing witness)? A. This information was obtained from our company's counsel.

Q. Your company's counsel? A. Yes.

Q. And who is that? A. Mr. Thomas E. White.

Q. Did you have any independent reports or any independent information before you other

than Mr. White's statement to you, when you verified that answer? A. No, I did not. 1309

Q. I show you now paragraph 20, and ask you where your information came from upon which that statement was made (handing witness)? A. It also came from Mr. White, our attorney.

Mr. Murray: That is all.

Mr. Schenck: No questions.

(Witness excused.)

PELL THOMPSON, called as a witness on behalf of the defendants, being first duly sworn, testified as follows: 1310

Direct examination by Mr. Murray.

Q. Mr. Thompson, what is your business? A. I am vice-president of Pease & Elliman. Real estate business. My particular line of work in the last few years has been appraisal.

Q. And you have been connected with Pease & Elliman how long? A. For nearly thirty years.

Mr. Murray: Your Honor, instead of going through a long examination of Mr. Thompson, I might state the purpose of his testimony so that if it is not admissible we can avoid going through a series of questions. 1311

The Court: Yes.

Mr. Murray: I would hope to prove by Mr. Thompson that on December 16, 1930, the building in its incomplete state and the premises had a value in excess of the amount of The Prudence Company's mortgage, and that by reason of that fact The Prudence Com-

1312 pany could not sustain any damage, by reason of the fact that the building was incomplete or that there were omissions and substitutions. This testimony is in accord with what I stated to your Honor at the opening of court this morning, as to what my theory was, and that if it were necessary to amend the answer to plead such a defense that I would ask your Honor to do so. Now your Honor has denied my motion to amend the answer, and the question now is whether Mr. Thompson's evidence would be admissible.

1313 Mr. Schenck: My objection to the evidence is, first that it is not within the pleadings, second that it is legally irrelevant, involving possibilities of advantage and damage from elements of the transaction that were not bonded by the surety company. That of course is a very broad issue. The surety company does not bond the repayment of this money, and the inclusion in the problem of loss of the real estate and varying real estate matters is something that we deem entirely irrelevant in this controversy.

1314 If your Honor has any doubt on the subject I should like to argue that matter a little further. Then there is a third ground wherein we object to testimony of this nature from this witness, and that is that inasmuch as The Prudence Company has a deficiency judgment against the Central Park Properties, the principal on this bond, for over $700,000, the opinion on the part of any witness as to matters of value which have been enumerated in this

deficiency judgment is entirely irrelevant and incompetent. 1315

The Court: When was the property sold?

Mr. Schenck: The property was sold—

Mr. Murray: March 17th.

Mr. Schenck: March 17th.

The Court : Of 1931?

Mr. Murray: Yes.

Mr. Schenck: Of 1931.

The Court: Irrespective of all questions of your right to adduce proof of this sort, and without any reflection at all upon the qualifications of this witness which I assume are of the highest, I cannot picture a situation in 1316 which the weight to be attached to such testimony can outweigh the result of the foreclosure sale.

Mr. Murray: That would be a mere matter of weight, your Honor. Possibly your Honor as a trier of the fact would find that even though Mr. Thompson testifies that the value was in excess of the principal of the mortgage, nevertheless—

The Court: That does not go to the competency of the testimony; it goes to the weight. I point that out.

1317

Mr. Murray: Yes.

The Court: And I would say almost without hesitation now that the opinion of any expert would not weigh with me very much, if at all, as against what took place at the sale.

(Further argument of counsel is omitted.)

The Court: In the first place, was there a market for a hotel of that kind, the sale of a hotel of that sort?

1318 Mr. Murray: That is one of the underlying questions, of course.

The Court: That is a fundamental question in determining value.

Mr. Schenck: If your Honor please, it seems to me that this defense in reality is a defense of payment. The bond in our particular case, to limit it somewhat to one class of damage, gives the surety company the right to complete; if it does not, it gives The Prudence Company the right to complete, and specifically provides that we may have our expenditure in completion with six per cent.
1319 from the date of the expenditure. Here the indebtedness has not been paid in full, and as proof of that fact we have this deficiency judgment of $700,000. It seems to me idle to discuss the question. We have not been paid, and if Mr. Murray contended that we had been paid we might have pleaded payment, because that is an affirmative defense.

The Court: I shall sustain the objection on all the grounds stated. You have your exception noted.

Mr. Murray: Exception.

1320 Mr. Murray: The defendant rests, your Honor. I renew my motion to dismiss.

The Court: You do not have to renew any motion now.

PLAINTIFF'S CASE IN REBUTTAL.

Mr. Judd: There are just a few points to cover up in rebuttal, your Honor.

JACOB H. LANDSMAN, called as a witness on behalf of the plaintiff, in rebuttal, being duly sworn, testified as follows: 1321

Direct examination by Mr. Judd.

Q. Mr. Landsman, what is your occupation? A. Painting contractor.

Q. How long have you been in that business? A. Twenty-one years.

Q. Can you tell us what sort of work you have done? A. The better grade of work in New York.

Q. Can you tell us a few of the buildings on which you have worked? A. The St. George Hotel, a job that amounted to almost a hundred 1322
thousand dollars; then the Phipps Estate, a job of about fifty or sixty thousand dollars; the Alden Hotel, amounting to about forty or fifty thousand dollars.

Q. What has been the nature of your personal connection with these painting jobs? A. Management. I am personally in contact with the men on the jobs; visit them in the day, twice or three times a day.

Q. Can you tell me whether in the Spring of 1931 you visited the Essex House on West 59th Street? A. Yes, by invitation to figure that job.

Q. Will you tell us what you did there? A. 1323
Well, first of all we went through the entire building, on account this building was not half-finished, and we had to go through room by room. Generally we figure a new job by the foot, or by the room.

Q. Will you tell us particularly in what state the painting was on the walls of this building when you first examined it? A. We examined when we went through the building starting with

1324 the ceiling. We found that they were stained. I am talking from the second floor up; not the first floor, not including the freight halls, the service halls, what they call them, certain parts. The ceilings was defective, not properly filled up, cracks or little holes, which is visible when you put on lights.

Q. The little holes in the ceiling? A. Yes. And then the calcimine itself was not thick enough to cover the surface. And that is with the ceilings. Then with the walls—

Q. Will you tell us about the walls in the building? A. The walls were found in very bad shape.

1325 Some rooms had two coats of paint, some rooms had but one coat of paint, and we considered sometimes one coat of paint enough to cover a surface but sometimes when we found two coats of paint do not cover, as they apply very thin and not mechanically, and we find that was smeared over, and calcimine spots, which is usual when the painter gets through the ceilings, washing it off, that was not done, and we have to rectify that; we have to rip it out with the plaster and sparkle that, and so forth. We found on the walls lots of small plaster with little pimples, which when you finish the work you cannot see that on the

1326 first or second coat, but you finally see on the last coat. Examined spots and so forth which is defective, and you have to rectify it. You have to rectify it and rip out the whole paint and take off those lumps and get the sparkle out, to make the smooth finish.

Mr. Murray: Is that an answer to your question, as to how he found the state of the walls?

Mr. Judd: I asked how he found the state of the walls. If you want me to ask my questions in more detail, I will. 1327

Mr. Murray: He is telling what he had to do.

The Witness: That is how I found it.

Q. Would you say from your observation of the walls they had ever been sparkled? A. Very little. Very little. Some rooms had only—very light rooms, like the corners, the large rooms, we find a little work done properly, but the rest of the rooms, the smaller rooms, was not properly and not mechanically at all done. The same thing applies to the trim. The trim is all fireproof stuff, and this is in course of construction, when you install that work, you see, when you put up the partitions, the buck partitions, they install those bucks, and by doing that process and the building is going on, that gets a little rusted and defective, and this has to be done in a proper manner before applying paint. 1328

Q. Mr. Landsman, I show you Defendants' Exhibit I, and ask you if that is the contract for the painting work on these premises (handing witness)? A. I think that is the contract I signed.

Q. I call your attention to a provision in here for sparkling all walls, due to the removal of panel moulding throughout the building (indicating). Is that the sparkling of which you have just been speaking? A. No, those mouldings would be on the walls, and always we find fine cracks between the walls and the mouldings, which we have to sparkle that out and make a sufficient job it would not look dark spots, and so forth. I do not think this increased 10 per cent. more, on the sparkling on the walls. That is all I think 1329

1330 I did by removing same and plastering up those holes where the nails was pulled out.

Q. What would you say was the reasonable cost of the sparkling and the first coat of paint over the portion where the panel moulding had been? A. Well, I would say by doing it while we are in the room, we generally apply a thin coat of shellac instead of priming it, and we apply the second coat of paint on the same, throughout the room.

Q. I do not think that quite answers my question. I was asking what you would consider the reasonable cost of doing all the sparkling and
1331 shellacking of the— A. The cost of this work?

Q. Yes. A. By removing the moulding? I told you about 10 per cent. increase above. If these mouldings would remain we have to plaster all this—when the moulding is put down, and especially that building was not properly I suppose heated and so forth, and it gets wet and dry, and the moulding pulls away from the wall, and we have to fill up those cracks. And I think it is 10 per cent. increase, by removing this moulding, to do that work.

Q. Can you tell us how the labor of sparkling of which you have spoken, the entire room, com-
1332 pares in amount with the work of putting on the first coat of paint? A. You see, when we go into a room we have to examine specially. We find all the lumps from plaster, cement and so forth, and scrape that off and sandpaper it down smooth, and then we sparkle. Sometimes we have six rooms a day a man can do, and sometimes eight. In the bedrooms we find eight.

Q. Is that work, then, that is more or less involved in putting on the first coat of paint? A.

Well, when we generally put on the first coat of paint, you know, when there is only a little plaster on the wall, and when you apply any paint it makes it harder. You take it off and make a smooth finish. By applying the paint. There is very little attention needed to that bare surface. 1333

Q. About how many rooms a day can a painter paint with the first coat? A. On the priming coat from twenty to twenty-two rooms.

Q. And you say in sparkling he covers how much? A. Six to eight rooms, if it is a good man. This brings up the smooth job.

Cross examination by Mr. Murray. 1334

Q. When did you start working on this job, Mr. Landsman? A. I think the first payroll of ours was May 1st.

Q. Have you got your daily worksheets? A. No, I did not take it along, but I have my weekly payroll here.

Q. May I see it? A. Yes (handing Mr. Murray).

Q. There is an item here May 1, 1931, 77. What does "77" mean? A. That is 77 days labor.

Q. And then "½". A. That is half a day.

Q. What does the seventy-seven and a half days apply to? A. It applies to $13.20 each day, at that time. 1335

Q. Does this seventy-seven and a half days, then, include the time for all the workmen employed; is that right? A. Absolutely.

Q. Then explain how you arrived at seventy-seven and one-half days for May 1, 1931. A. We have a timekeeper on jobs like that and he checks off the men every day, twice a day, in the morning there when they start and he comes there around three o'clock and he walks through the job and he gives in every day the time in the office.

1336 Q. You do not show how many workmen were on the job, do you? A. No. Sometimes there is 25, sometimes 30, sometimes 50. If you need it I will bring it, I will exhibit it.

Q. Is there any means of determining from the seventy-seven and one-half days for a week how many workmen were employed? A. Well, if you want to exhibit that I will have to go down to the office and take it out of the books.

Q. Is seventy-seven and one-half days the total time of all the workmen employed there during a week? A. Yes, sir.

Q. Is that it? A. Yes.

1337 Q. Added together? A. Yes, sir.

Q. How many hours a day in the workday? A. Eight hours at that time.

Q. And how many days in a week? A. Five days.

Q. So that just for computation purposes if you divide 77½ days by 5, do you get the amount of time spent on an average for each of those 5 days? A. No, I would not say that. Sometimes we started Monday with three men, and Tuesday we increased to five men, and Wednesday we had already fifteen men, and Thursday we might took away ten men.

1338 Q. But you missed the words which I used, "On the average", Mr. Landsman. A. On the average, yes.

Q. Is there any simple way of your arriving at how many men were on the job from day to day? A. Oh, yes, we have books for that. We have time books and original books.

Q. Have you got any other record with you which would show in any other form? A. No, I did not take along. I only took along the time books.

Q. You have stated that your firm does better grade work. What did you mean by that? A. If anybody wants our service and we figure a job, we always get all the prices—or we get a little more as the next man. 1339

Q. In other words, your cost of doing the work, to an owner is higher than the cost of other contractors? A. Not exactly on every case.

Q. Do you do the best painting work in New York? A. Well, I would not say that. There is still better than me. There is no ground for painting. You paint a room and spend $2,000 and you can paint the same room for five or fifteen dollars, too. 1340

Q. Is there any contractor in New York more expensive than you? A. Oh, yes, when it comes to decorations.

Q. No, I mean plain painting. A. Well, there is indeed. They might have a bigger overhead than me. I don't know what they figure.

Q. But outside of the overhead there is no more expensive painter in New York than you? A. No, I would not say that.

Q. When did you paint the St. George? A. A year previous, or a year and a half.

Q. A year previous to what? A. About 1929.

Q. Was that a Bing & Bing job? A. Yes. 1341

Q. Do you do most of Bing & Bing's work? A. No, I didn't do no work for them in the past—since 1925.

Q. How did the cost of labor and material in 1929 compare with 1930? A. I think there was an increase. At that time in 1929 we paid $12, but at that time there was a strike and they increased it to $13.20, the painters. That was in 1928 or 1929. This I could not recollect myself.

1342 Q. Was it in 1929 you did the St. George? A. Some time between 1928 and 1929.

Q. And wasn't the cost of labor and material at that time at its highest? A. Not in the painting line. If I could recollect myself, we had a little strike and they settled quick, the association, and you see I did not take no active service much in that job, as my brother. I used to only visit once a day. My brother, who actually took on that job, had more than me. I don't know the details so much. You see, this job happened and I was there twice or three times a day.

Q. I am talking about the cost of labor and the
1343 cost of material in 1928 and 1929. Wasn't the cost of labor and material at that time the highest that it has ever been? A. No, not in the painting line, because labor—materials were the same.

Q. Because what was the same? A. The material was the same. The material, the painting material.

Q. In other words, the painting material which you purchased in 1928 and 1929 was no higher than what you purchased since; is that right? A. That is right.

Q. So that since 1928 and 1929 the cost of painting material has not dropped in the slightest? A.
1344 In certain various little things a drop, but not in the main item.

Q. In what has it dropped? A. For instance, in colors. But the main item what we use, the flat stuff, the lead, did not drop very much. Very slight.

Q. Did it drop? A. Very slight.

Q. How much did it drop? A. For this I have to take records for the last four years, my dear man. I could not remember all those things.

Q. Can't you tell us how much it costs you from year to year to do your business or do a job? A. Yes, but this is four years back, you are recalling or five years back. 1345

Q. Will you admit that the cost of material dropped a little bit after 1929? A. Yes.

Q. Will you admit that? A. Yes.

Q. How about the cost of labor? A. Labor, I will look it up and show it to you. I think that since 1928 the labor increased.

Q. When did it increase? A This I will have to look up the records. I know we only paid in 1927 and 1928 $12 a day, and that was the association, which they settled for, $13.20. 1346

Q. You have been in this business how long? A. Oh, about twenty-one years.

Q. And the cost of labor is one of the material items in carrying on your business, isn't it? A. Yes, sir.

Q. And yet you cannot tell me whether the cost of labor remained the same in 1928 and 1929 and 1930, or whether it went down or went up? A. Well, approximately I think it is the same thing. I know a fact that we only paid in 1926 and 1928 $12, and then it was a strike and the association settled for $13.20. In the same year we had the Phipps Estate, and that is what we know, we did a job at the same time, and we paid $13.20 a day. 1347

Q. How much was labor; how much did it cost in 1931 when you did this job? A. It cost $13.20 a day.

Q. And how much did it cost when you did the St. George? A. I don't know, to say if it was the same money. I would have to look up the records.

Q. How many rooms are there in the St. George? Oh, there was there about—I don't re-

1348 member exactly. That is the new extension we made. About I presume nine to a thousand rooms.

Q. Nine hundred to a thousand? A. Yes, something like it.

Q. Is that in the old hotel or the extension, or both? A. The new hotel. The new extension.

Q. How many rooms were in this Essex House? A. About twelve-hundred.

Q. Did you know in 1929 and 1930 the Globe Painting Company? Did you know the Globe Painting & Decorating Company? A. I knew the man, Mr. Gladstone, personally.

Q. You knew Mr. Gladstone? A. Yes.

1349 Q. You knew it was he who had done this job at the Essex before you came in? A. Yes, I know that.

Q. What was his reputation in the trade? A. I would not say that. I would not state that. I would not condemn a man and I would not say he is the best or he is the worst.

Q. Haven't you any idea what his reputation was? A. Your Honor, do I have to answer that question.

The Court: You can say if you know. Do you know what his reputation was?

1350 The Witness: His reputation was fair. I didn't have much dealings with him.

Q. Now, I understood you to say that the painting job was not half finished when you looked it over in May, 1931, or in April, 1931? A. No.

Q. When was it in 1931 that you went to the job? A. About the 5th or 6th of April.

Q. And the painting was not then half finished? A. Some of the rooms were not start, like the sec-

ond and fourth floors, where they had all the lockers, and there was still all junk laying there. 1351

Q. There was no paint on the walls? A. On the walls, certainly not. Some of the rooms there was no paint at all.

Q. Anybody who came in could see that there was no paint on the walls, is that right? A. On those second and fourth floors, yes.

Q. Where there was no paint, anyone could see that? A. Yes. Some of the rooms were locked, and you couldn't get in there; there was tool boxes in there, and they didn't want anybody to touch them. After we examined the entire job, we had a key, and we went in and saw those rooms. 1352

Q. Did you use any of the paint which was already on the walls, or did you an entirely complete job? A. Well, I wouldn't say we used the paint on the walls. The way that you apply paint, the paint was applied not in a mechanical way.

Q. Not in a mechanical way? A. No.

Q. How many coats did you put on the walls? A. We found some rooms that had to have three coats too, because it would not cover.

Q. How many coats did you apply in other rooms? A. In certain rooms two coats.

Q. And in those rooms where you put on two coats, was any use made of the paint which was already on the walls? A. Well, only as I said before, as a primer, which reduces almost four times as much as when you have to start and finish by preparing a job. 1353

Q. Let me get that again: What about this primer, and what about four times as much? A. When we apply a second coat of paint to make a smooth finish, this has to be prepared with sandpaper, to sparkle it and apply a heavy coat of

1354 paint to cover all the defects; but when we apply a coat of primer, we want to scrape off the little lumps, to make a finish on the walls.

Q. So that in putting on your finish coat of paint you always use sandpaper to scratch off these little lumps? A. No; we have to use sparkle, and then scratch it.

Q. Well, what is the final coat of paint? A. First you apply—for instance, we sparkle up with sandpaper in some cases to make it presentable, and we have to apply a coat of glue size, and then a coat of lead and oil paint, to make a uniform surface. Then we apply a coat of flat paint, and
1355 stipple it to make it presentable to move into.

Q. The last is the stippling, is that right? A. Yes.

Q. And before that what is it? A. Lead and oil.

Q. And before that is what? A. A primer.

Q. Now, assume that you have a primer on the wall, and you are going to apply lead and oil, the final coat; did I understand you to say that you used sandpaper to go over it to get these little lumps off? A. It is not only sandpaper, but when you find conditions as they were there, you have to scrape off those lumps, and start a little ahead
1356 to stipple it more, to keep out a little more plaster than usual, when there is no paint on it.

Q. Is this sandpapering and those other things which you have spoken about—would you consider that part of the final coat? A. No, that is part of the preparation, preparing for it.

Q. Then, that is the preparation for the final coat? A. For the second coat.

Q. Well, what is the stipple? Is the stipple a coat at all? A. We have to make a smooth surface, you see.

Q. Is the stipple a coat of paint? A. The stipple is to make a uniform color and uniform shade on the walls. 1357

Q. But is it a coat of paint? A. It is, indeed, yes.

Q. Then, the stipple is the last coat of paint, is that right? A. Yes, that is right.

Q. And the lead and oil is the coat of paint just before the stipple, is that right? A. Yes, to make the surface smooth, and so it will not be observed.

Q. Do I understand you to say that when you put on the lead and oil paint before the stipple, you do those things that I have mentioned? A. Yes. 1358

Q. The sandpapering and so forth? A. Yes, and sparkling and plastering what is necessary.

Q. Now, you say that above the second floor the ceilings were stained. What were they stained from? A. It seemed to me of moisture.

Q. From moisture? A. Yes, in my opinion.

Q. And where would that moisture come from? A. I think by not proper ventilating during the winter time. If the weather is changeable from hot to cold, and usually in a new building it is not properly ventilated, I think that causes it.

Q. And would that be caused by an absence of heat? A. By an absence of proper ventilating. 1359

Q. And not necessarily heat alone, but ventilation? A. You have got to have a certain amount of heat too—not a high temperature. You know that the walls in a new building, if you walk in, you will find them all damp, if you have no ventilation and heat.

Q. Now, have you any independent recollection of how many rooms there were in which you had to start painting from the bottom up; in other

1360 words, with a primer? A. Well, you have got to be an angel today to remember that,—going through a job three times, with 1100 rooms, and 600 bathrooms. I think I would have to be a genius to do that.

Q. Have you any record to show that? A. When we figured the actual job, we figured this up. We go through this room and say we can finish it in 24 hours; and that is the only record, and that is put away somewhere.

Q. Now, I ask you whether you can tell me, whether you know how many rooms there were in that building where you put on three coats of
1361 paint? A. Oh, to make the job proper, a certain amount of rooms you have to apply two coats of paint, and the last coat is stippled, and if it does not come out right, and it is observed, you have to make patches, and to go over it and take some glue size and size it over again, and put on another coat of paint.

Q. But you do not know how many rooms there were of that type? A. Well, I would approximate about almost 40 per cent. of the work.

Q. So about 40 per cent. of the work already done you did not use at all as a base, is that right? A. Only on the last coat. The other work in con-
1362 nection with the wood work, the ceilings and so forth—

Q. When you say "40 per cent." you are now talking about— A. (Interposing.) The walls.

Q. (Continuing.) Those walls where you did not make any use at all of the prior coats? A. Absolutely.

Q. What kind of job were you told was wanted? A. The best that could be made of it.

Q. A perfect job? A. Absolutely.

Q. And with that instruction, you gave your 1363
estimate? A. Yes.

Q. Do you know what the original contract called for? A. You mean the specification? Not the contract?

Q. The original contract? A. I don't know about the contract. I saw it in the specification.

Q. What did the original specifications call for? A. It called for more work than I did.

Q. What did the original specifications call for as regards coats of paint? A. It called on the ceilings to apply three coats of paint, instead of kalsomine.

Q. And what else? A. On the walls some were 1364
three coats, and all the stuff that was necessary, and the same on the wood work.

Q. How many ceilings were there or what proportion of the buildings showed stains on the kalsomined ceilings? A. I would say almost 95 per cent.

Q. 95 per cent.? A. Yes.

Q. Now, even though the painting job had been perfect in the first place, stain could come through just the same, could it not? A. Well, if it would be shellacked or given a coat of alum size, which I presume only I found in corner rooms—four 1365
large rooms in each corner, where that was done —and put on a heavy coat of kalsomine, after it gets to be unusual weather like that, we find many cases that it stains a little after it dries out, and comes back; but this was put simply on plain plaster, and that plaster was poor plaster, with not enough gypsum to have the strength to keep the kalsomine on.

Q. Will you answer this question: Are you of the opinion that the kalsomine was put over the

1366 plaster before it was thoroughly dry yet? A. I don't say that, no. It was dry.

Q. How do you know it was dry? A. Well, I presume that when they make kalsomine ceilings, they know—the mechanics or the man who is in charge, he will not kalsomine ceilings on a wet surface, because when kalsomine goes on a wet ceiling, it shows right away, and spots and makes it right away yellow.

Q. Suppose that a painting job had to be done by a certain time: Is it not possible that the paint would have been put over a damp ceiling or on a damp wall or on undried plaster? A. There is a
1367 certain preparation, if you want to spend a little more money. I do certain work that I pay four dollars a gallon for a certain preparation, and I put on a coat of that stuff, and apply a coat of kalsomine, and it will stand for another year, just as well as if it was dry. I do that in many cases where people are in a hurry.

Q. But that would require extra work, would it not? A. Yes, it would.

Q. Now, what is rust? You mentioned that, did you not? A. Yes.

Q. What is rust? A. You see a fireproof door. You know what that is? That is iron—rough iron.
1368 When that stands for a time—a certain time—and a poor primer has been used, with not sufficient lead and oil in it, it starts in the corners especially, to rust—and you know what rust is on a piece of iron.

Q. Now, is it not the fact that because of the construction of the building itself there may be iron in the partitions— A. (Interposing.) No, you are wrong. It is that heavy wood work there. This is a 40-story building, and under the building

code they should have fireproof trim throughout the building. There is no wood in the building at all, and that applies to the doors and casings and jambs, and the windows and so forth. 1369

Q. Well, if I walk into a room today and see in the corners rust marks which have come through the paint— A. (Interposing.) Not in the corners, but we are talking about the trim.

Q. No. I am not talking about trim. I am talking about the walls. A. The walls are all covered with plaster. There is no rust that comes through on the walls. I did not state that.

Q. Well, is there such a thing as rust which comes through paint after it has been applied, because of the material which is underneath the plaster? A. There is a certain saltpeter, as we call it, which comes out from dampness in a building in certain places. We call that saltpeter. You see yellow spots on a wall running down, just like a yellow pine tree that gives out a substance, and that is what this is—the same. 1370

Q. Now, what did you do on your job in addition to the painting? You did something more than painting, did you not, on this job? A. We got paid for what we did.

Q. There was some papering, was there not? A. Yes, we papered too. 1371

Q. And where was the papering done? A. In the bathrooms.

Q. All the bathrooms? A. Yes.

Q. Anywhere else? A. In the public halls.

Q. In the public halls? A. Yes.

Q. What do you mean by the "public halls"? A. The corridors for entrance to all the apartments.

1372 Q. What is Lithophone base paint? A. That is a process made of Lithophone and Chinese oil and so forth. That is what they call for the last coat of paint.

Q. Did you use that? A. Yes, a better grade from the Keystone, which makes the best.

Q. That is the best there is? A. The best that is made in that class of material.

Q. How does it compare with white lead? A. Well, that is not for a final coat. White lead gives a base.

Q. What is used for the final coat besides Lithophone? A. In the olden days we used plain lead,
1373 about 25 years ago when I was a working man.

Q. Lithophone is used for a final coat? A. There is a certain amount of Lithophone in the material. It is not Lithophone itself.

Q. It is a Lithophone base? A. Yes, what we call "chalk".

Q. Is that for a final coat? A. They use—99 per cent. is used for a final coat in all the buildings.

Q. It is used for other coats besides? A. No; only in undercoating for enamel it is used, but it called by a different name; but Lithophone is the right name for it. I am not a chemist, you know.
1374 This is a chemical process, and it is only used 40 per cent.—

Q. In how many coats did you use Lithophone? A. In the last coat.

Q. In the last coat? A. Yes.

Q. Did you use it in next to the last coat? A. No, sir. That is the only thing that gives a smooth finish, and when we had to do over a room, we used that.

Q. Could you tell by an examination of the painting which you saw before you started to work whether there was any Lithophone base in any of the work which was there before you? A. Well, I am not a chemist. I couldn't say that. I would say there was not body enough of lead. 1375

Q. Did you know that the original specifications called for a Lithophone base in two coats of paint? A. I think if it did call for Lithophone to be used in a proper manner, it could be used, but not to make a real good job.

Q. But you only used Lithophone once? A. I used it on the last coat, yes.

Q. Did you paint the ceilings? A. No, we did not. 1376

Q. How many ceilings did you re-kalsomine? A. Almost practically the whole house.

Q. And that would be how many rooms? About 1200 rooms? A. I couldn't say that. I will show you the extras here (exhibiting paper).

Q. There were about 1200 rooms in this hotel? A. Something like that, yes.

Q. And you say that you re-kalsomined practically all of them? A. Almost all of them.

Q. And was the need for re-kalsomining caused in some instances by this strain you have spoken of? A. And a little defective plaster, which was not sparkle in the small halls, and in certain cases thin kalsomine which showed through the body. 1377

Q. What causes these pimples in the plaster which you have mentioned? A. By not cleaning up when you prime the walls.

Q. But what causes the pimples in the plaster? A. This is by mechanics working in a building doing a little cement work, patching in the rooms,

1378 and they drop a piece of plaster, and it slops up on the wall, and that is what caused it. He does not take the time to clean that off. Or a kalsomine man spots the walls, and they do not wash it off. It takes only about two minutes to wash it off, but it takes, after that, two hours to correct it.

Q. Mr. Landsman, on the St. George job the cost approximately was a hundred dollars a room; is that right? A. About.

Q. When you estimate on a job do you usually estimate on the basis of so much per room? A. The area. Take the area.

Q. Do you know what the area of the St. George
1379 is as compared with this? A. It was almost two rooms of the St. George for one of those rooms.

Q. What is that again? A. Two room space, very small rooms. The St. George Hotel is approximately a room there 10 or 9 by 14 by 15, and here is rooms the smallest is 12 by 18—the smallest.

Q. So that the rooms in the Essex House are larger than in the St. George Hotel? A. Almost by 60 to 70 per cent. larger.

Q. So that if you went in to bid on the Essex House originally on the basis of footage—is that what you call it—how much would you say you
1380 would charge per room? A. You see, we include all the exterior work and all the public work. I would presume that that job would amount, including bathrooms and closets, about over a hundred thousand dollars.

Q. The St. George with smaller rooms was a hundred thousand dollars; is that right? A. Nearly a hundred thousand. I did not say it is a hundred thousand.

Q. I have marked down here a hundred thou- 1381
sand dollars. How close to a hundred thousand dollars was it? A. Well, if I could recollect, my memory.

Q. And if the rooms were the same size as the Essex House rooms, how much more would it be? A. That would cost more.

Q. How much? A. Another twenty-five to thirty thousand dollars.

Q. So that you would get up to about $125,000? A. Yes.

Q. Or about $125 per room? A. Something like it.

Q. On the same basis in the Hotel Essex, at $125 1382
per room, what would the contract price be with twelve hundred rooms? A. Twelve hundred rooms, that would be about $135,000 to $140,000, something similar to it.

Q. Do you know that a contention is made here that the cost of doing the Hotel Essex job according to the specifications, would be about $90,000? Do you know that? A. Yes.

Mr. Judd: Excuse me. Your Honor, I do not think that is the contention. The question is the completion of it.

The Witness: I will answer that question. 1383

The Court: He says he has no objection to answering the question.

The Witness: The question, $90,000, what work was done.

Q. What is that, again? A. You see, those public halls and the outside. You see what I mentioned, the freight elevators. That was already finished and the $90,000 was excluding all that work.

1384 Q. So that do you understand the contention is that if the original work had all been done perfectly with two coats of paint, and that there remained only the final coat of paint to be put on, that the cost of doing that would be $90,000? A. To rectify the job.

Mr. Schenck: I think having the witness testify to contentions is a little aside from the point.

The Court: Mr. Murray, it is not going to be very persuasive whatever he says. The standards of comparison have not been accu-
1385 rately fixed. The witness says "about" and so on with respect to the St. George job, and I cannot get anywhere with his conclusions.

Mr. Murray: I am trying to get some basis of comparison, your Honor.

The Court: But, after all, when you get down to that why not ask particularly with reference to the basic or unit prices?

Mr. Murray: All right, your Honor.

Q. You have an idea, haven't you, Mr. Landsman, of proportionately how much the first coat, the second coat and the third coat cost? A. Not
1386 exactly. It is not machine work. When a man works a machine he knows that piece costs so much to manufacture. But when you have between sixty and seventy men, one is doing a little more and one is doing less, and you have to take the average.

Q. But in your experience haven't you arrived at some approximation of what that proportion is? A. Yes, new work, when I start the job myself.

Q. Let us assume new work, then. Approximately what is the proportion that the first coat

bears to the whole job, in a room? A. In a room 1387
the first coat of paint bears almost I would say about twelve per cent.

Q. And the second coat? A. About 38 to 40 per cent.

Q. And the third coat? A. Well, between the coats there is the sparkling and the preparation.

Q. Will you give me, then, the different steps, with their proportions? You have 12 now for the first coat, 38, was it, for the second? A. Yes.

Q. Tell me what the other items of work would cost, in proportion. A. About 25 per cent.—you know, it is not accurate.

Q. I am not asking you to tie yourself down. 1388
A. And then there is the finishing coat. One room takes a sparkle one hour and another four hours. You find more holes. It is a simple matter, and sometimes we gamble and we figure in the average.

By the Court.

Q. Suppose you estimate that the painting of one of these rooms is $100—that is, the cost $100. A. Yes, your Honor.

Q. Of that $100 what would you say was a fair amount to allow for the third or final coat? A. 1389
The second, the sparkling and the second, and the third coat is almost 88 per cent. The sparkling preparation and the second coat and the third coat is almost from 85 to 88 per cent., as the final coat.

By Mr. Murray.

Q. Can't you subdivide the second coat and the sparkling and the final coat into some percentage? A. We do once in a while, but not in a case like that.

1390 *By the Court.*

Q. Never mind what the case is. Suppose you had the St. George Hotel which you started to paint, and you figured that each room was going to cost about $100. At least that is the basis of your charge to the owner. How much of that $100, in dollars, would you say the first coat of paint represented? A. That is 12 per cent.

Q. $12? A. Yes.

Q. And the second coat? A. About $38, with all the preparations. You see you have—

Q. Never mind. Let me ask the questions.

1391 What is left, the third coat? A. The third coat and the stipple.

Q. Would that cost $50? A. No, that is between 25 and 28 per cent., and preparations between those coats.

Q. What is that? A. Like sparkling and sandpapering.

Q. Then as I have it, it would be $12 for the first coat, $38 for the second, $28 for the sparkling and miscellaneous things? A. Yes.

Q. And the balance is the third coat with the stippling? A. This includes also the public work.

Q. What is the public work? A. You see, there

1392 is halls, closets, windows, cellar work. That is figured in in this figure.

The Court: Well, that gives you the percentages.

By Mr. Murray.

Q. You said something on your direct examination, Mr. Landsman, about 20 to 22 rooms for one man. Do you remember that? A. Yes.

Q. What is that? A. That is the priming coat.

Q. One man could do 20 to 22 rooms in one day? 1393
A. Yes.

Q. And one man could do six to eight rooms of sparkling in one day; is that right? A. Yes.

Q. Have you any record to show what you paid for labor on this job? A. Yes, sir.

Q. Have you? A. Yes, sir.

Q. Where is it? A. Not here. I told you.

Q. May I see is? A. Not here.

Q. You have not got it here? A. No.

Q. Do you know what the proportion of labor was and what the proportion of material was? A. On this job, yes.

Q. What was it? A. About 22 per cent. 1394

Q. For what? A. For material.

Q. And how much for labor? A. The rest is the labor.

Q. 68 or 78 per cent.? A. Well, don't I have to make anything, too, on it?

Q. I was getting to that. How much do you take out for profit? A. Well, it happened this job only gave us about seven and a half per cent. net profit.

Q. How much would you say of the price was given over to the cost of labor and how much to the cost of material? A. Well, it is right here. You got my schedule there for the labor. That is 1395
easy to identify in there.

Q. (Mr. Murray hands witness paper.) A. That is a set compensation. Only on labor alone, except paperhanging. They paint a certain room, which costs so much. Now that is $51,136.80 actually paid to the labor.

Q. For painting alone, or painting and papering? A. No, papering I got out of it also.

Q. Is there included here anything for papering? A. No.

1396 Q. May I see what you have for papering? A. (Witness hands Mr. Murray paper.)

Mr. Murray: I offer in evidence these different instruments, which we shall clip together.

(Marked Defendants' Exhibit R.)

The Court: That labor item of $51,000 does not include labor for hanging the paper?

The Witness: No.

1397 SAMUEL ZILBER, called as a witness on behalf of the plaintiff in rebuttal, being first duly sworn, testified as follows:

Direct examination by Mr. Judd.

Q. Mr. Zilber, what is your occupation? A. Civil engineer and general contractor.

Q. Will you tell us briefly your training and experience? A. My experience is mainly in apartment hotels since 1922. For the last twelve years I am in the building construction game, as superintendent of construction, as an estimator, and I also award contracts to contractors.

1398 Q. Will you tell us where you were trained as a civil engineer? A. The Brooklyn Polytechnic Institute.

Q. Can you tell us the names of some of the apartment hotels on which you worked? A. The Hotel Oxford, 205 West 88th Street; the Hotel Bradford, 210 West 70th Street; Hotel Alcott, 27 West 72nd Street; Hotel Beekman, 63rd Street and Park Avenue, and Hotel Park Royal, 23 West 73rd Street.

Q. And in connection with these hotels you have received estimates and let contracts for all the construction work? A. Yes, sir. 1399

Q. Have you ever had experience in the completion of an apartment hotel which had been abandoned before completion? A. Yes, sir; the Hotel Beekman at Park Avenue and 63rd Street.

Q. Can you tell us briefly what peculiar problems there are involved in such a completion job? A. Well, there are all kinds of difficulties, but mainly it costs too much to finish the job.

The Court: A little louder, please.

The Witness: It costs too much to complete. 1400

Q. Because of what? A. First of all on account of the time the building deteriorates to a certain extent. You have to do certain work all over, as it was never done, and besides that extra charges for carrying it, and to heat it out properly, to ventilate it properly, to have watchmen, labor to clean it, and so forth.

Q. Is the supervision greater? A. Yes, very much. It is entirely different when everything is organized. The foreman knows where to send his men. It is like a machine, every day we know what to do. When it is abandoned one has to do something on the second floor, something on the third floor, something on the sixteenth floor; the work is scattered all around, and much more difficult to supervise. Each contractor, if he has twenty or thirty men on a job, it is sufficient for him to have one foreman; if it is an abandoned job and he has to resume the work he has to have two. And then there is more office work. 1401

1402 Q. Have you examined the Essex House which is the subject of this suit? A. Yes, sir.

Q. Have you examined the plans and specifications upon which it was agreed to be built? A. Yes, sir.

Q. I show you Plaintiff's Exhibit No. 85, that is the schedule of omissions and substitutions (handing witness), and ask you if you are familiar with that? A. Yes, sir.

Q. Have you checked the items in that schedule? A. Most of them.

Q. Are the items referred to in that schedule called for by the plans and specifications? A.
1403 Yes, sir.

Q. And are the quantities stated in that schedule the amounts shown by the plans and specifications? A. Yes, sir; computed by me.

Q. Can you state whether or not the amounts stated as the value of the various items are or not the reasonable cost of such items in 1930 or 1931? A. Yes, they are reasonable.

Q. I call your particular attention to the item Medicine Cabinets. Have you examined the medicine cabinets which are now in the Essex House? A. Yes, sir.

1404 Q. Are they in your opinion the best which could be obtained? A. Not at all.

Mr. Murray: I object to the question, your Honor.

The Court: Why?

Mr. Murray: It is not a question whether they are the best that could be obtained. They are only required to put in the usual.

The Court: What does the specification say about the medicine cabinets?

Mr. Judd: The specification allows $10,000 for medicine cabinet expense. 1405

The Court: Then ask him to describe them and state how they compare with others of that kind.

Q. Will you state what sort of medicine cabinets are there now and how they compare in quality with those in comparable hotels? A. They were very much of inferior quality, as the mirror, the weight of the metal, and also the enamel work.

Q. It has been testified by one of the defendants' witnesses that the medicine cabinets are the same as the cabinets in the Savoy-Plaza. A. No. 1406

Q. Have you examined the medicine cabinets in the Savoy-Plaza? A. I did.

Q. How did the medicine cabinets in the Essex House compare? A. It compares only as to size of the medicine chest in the Savoy-Plaza, but not as to the quality. As to the mirror, the quality of the mirror, the weight of the door and the enameling.

Q. Is there any place in the medicine cabinets in the Essex House for a toothbrush? A. No.

Q. Unless it is laid down on the shelf? A. On the shelf. 1407

Q. Have you examined the lighting fixtures in the Essex House? A. Yes, sir.

Q. Above the first floor? A. Yes.

Q. Can you state whether or not they are what you consider suitable and appropriate for a hotel of this character? A. I do not consider them appropriate for this type of hotel.

Q. Will you tell us why? A. I have installed fixtures in the hotels I have mentioned, and they

1408 are way, way superior, as to design and as to quality of the metal.

Q. What would you consider a reasonable amount to spend for fixtures in a first-class apartment hotel of 1,187 rooms? A. Taking into account my own experience in other hotels I would say between sixty and seventy-five thousand dollars, for this type of house, having in mind the hotels I built.

The Court: But the specifications did not tell the builder to make any such expense, but he must do it within the allowance of—fifty thousand dollars?

1409 Mr. Judd: I think the witness's testimony would indicate that $50,000 was a very moderate allowance.

The Court: I understand.

Q. Mr. Zilber, have you had any experience in the erection or installation of elevators? A. Yes, I have.

Q. And will you tell us whom you would go to for the completion of an elevator job? A. The same contractor that started the initial work.

Q. Will you tell us why? A. Can't get anybody else to fix the elevators, as I have had the

1410 experience.

Q. You cannot get anybody else? A. No.

By the Court.

Q. Why is that? A. Other companies would not like to interfere with the company that has the contract on that particular job.

Q. Why not? Is there some particular agreement among the companies to that effect? A. I don't know, your Honor, but that is the fact.

Q. Couldn't you get an independent electrical 1411
contractor to go in and complete it? A. Most of those independents are non-union.

Q. They are non-union? A. Non-union, yes.

Q. Aren't there any independent union electrical contractors? A. There were not in the years 1927, 1928, 1929 and 1930. Besides that, I would never dare to take in an outsider. That removes the obligations of my own company in case there is something wrong with the elevator.

Q. Are there guarantees in this elevator installation contract, so to speak? A. Yes, for a certain period of years.

1412

By Mr. Judd.

Q. Have you examined the plans for the Essex House in relation to a sanitary cove? A. Yes, sir.

Q. Can you tell me in what rooms or in what spaces a sanitary cove is included in the item of "sanitary cove" in Schedule B? A. In all the spaces of the basement, in all the public corridors, servants' entrances, elevator lobbies.

Q. In the guest rooms? A. No.

Q. Do the plans or specifications call for carpeting the full width of those spaces? A. I have not seen that.

Q. Can you show us on the plans any way in 1413
which a carpet might be installed so that the edge would lie flat (handing witness blue prints)? A. Yes, sir. The top of the base if five-eighths of an inch above the cement floor, the level of the cement floor. That gives enough room for the carpet to lay down on the floor and be on the same level as the edge of the base.

Q. Will you tell us whether there is any advantage in having a sanitary cove? A. Oh, yes, in

1414 the maintenance, and in cleaning the corridors it is a very great advantage.

Cross examination by Mr. Murray.

Q. In case where the elevator contract has been let, Mr. Zilber, I understand, then, that you are at the mercy of the elevator contractor for the life of the building where the elevators have gone in? A. No.

Q. Well, you can not get anyone else to do any repair work, can you? A. During construction.

Q. Can you get anyone else to do repair work after construction? A. After, yes; after all the
1415 mechanics are out.

Q. But during construction you say you cannot get anyone to repair them? A. No.

Q. Will you name some of the elevator companies which were in existence in 1930? A. Yes. A. B. See; Gurney, and the Otis Elevator Company.

Q. Now, Gurney, as matter of fact, is not a manufacturer of elevators, is he? A. They do manufacture now, yes.

Q. But at that time they did not, did they? A. Yes, they did.

Q. But a great part of their business was the
1416 installation of cars manufactured by other companies, was it not? A. No.

Q. Was that ever the fact with respect to the Gurney people? A. From 1924, I believe, then they started to make their own motors.

Q. Well, they always made their own motors, did they not? A. Well, I don't know just how they conducted their business.

Q. Didn't they manufacture their own motors at a time when they were not manufacturing cars?

A. I can not tell you. I have had only one or two experiences with the Gurney Elevator, and I didn't care whether they made them themselves or bought them from somebody. They installed the elevators. 1417

Q. So, as matter of fact, you did not know whether the cars were Gurney's own cars or someone else's manufacture? A. They are known as "Gurney Elevator cars".

Q. How many years' experience have you had? A. Twelve and a half.

Q. Don't you know as matter of fact that the Gurney Company were accustomed to buy cars from other manufacturers, and to place their own name thereon? A. No. 1418

Q. You don't know that? A. No.

Q. Well, would you say that was not the fact? A. I don't know.

Q. Do I understand you to say that the fixtures —electric fixtures costing $50,000 would not have been appropriate in this apartment hotel? A. I don't think so, after my own experience. They were of inferior quality.

Q. How much experience have you had in buying electric fixtures? A. Oh, for five hotels.

Q. What hotels? A. The Oxford, the Bradford, the Olcott, the Beekman and the Park Royal. 1419

Q. From whom have you purchased electric fixtures? A. For the Park Royal, the Beekman and the Olcott from The Lightolier Company.

Q. Is the Lightolier Company a good company for electric fixtures? A. Yes.

Q. And when you purchased from The Lightolier Company in these specific instances, did you buy standard equipment? A. Well, they have shown us designs and all kinds of samples, and we

1420 selected the samples we thought were appropriate for the building.

Q. Well, were they standard or not? A. I don't think so.

Q. Were they manufactured specially? A. No.

Q. Well, what do you understand a "standard" fixture to be? A. A simple design.

Q. Then, a design which is not simple is not a standard fixture, is that right? A. I should say so.

Q. So that if they had something more than simple designs already manufactured in stock, you would not call that a standard fixture? A. Well,

1421 they make drawings for each type of fixture.

Q. When? A. When they approach a client.

Q. Did they in any of the three instances that you have mentioned do that—in the three instances in which you purchased from them? A. Well, we have seen similar fixtures in the showrooms.

Q. Did they draw designs in the three instances which you have mentioned buying electric fixtures from them? A. Yes.

Q. Then, they were not standard designs? A. They were standard, with the exception that a

1422 few items we wanted a different finish on—maybe another leaf or a little longer or wider to fit a certain space.

Q. The Lightolier Company manufactures quite a lot of fixtures in numerous designs, do they not? A. Yes, sir.

Q. And if you want something more added, you are going to pay more money, are you not? A. Of course.

Q. And is it not very often the fact that although you pay more money than the standard

fixtures would cost, you are not getting a bit better fixtures than if you had taken the standard? A. Not with a reputable firm. 1423

Q. Well, you are getting another leaf probably or whatever it is that is added— A. (Interposing.) Yes. It costs a certain proportion more.

Q. And is it not a fact that sometime you can overdress a hotel by spending too much money on fixtures?

The Court: Having too many leaves?

Mr. Murray: Yes.

Q. Is not that a fact? A. I don't know about hotels. 1424

Q. You do not? A. I know a few.

Q. Do you know the Waldorf-Astoria? A. I have heard of it.

Q. Have you ever been in there and seen their fixtures? A. No.

Q. Well, what hotels have you been inside of? A. The hotels that I have named, and hotels in the same category—residential hotels.

Q. Do you claim that the Savoy-Plaza is in the category with the Hotel Essex? A. I should say it is.

Q. You would say that the Hotel Essex is as good as the Savoy-Plaza? A. By the name—in which way? 1425

Q. In the type of hotel? A. Well, the Savoy-Plaza, I think, is considered higher than the Essex. I don't know—to a certain extent.

Q. Well, don't you know? A. I am not acquainted with the transient hotels very much.

Q. You are not acquainted with what hotels? A. Not with transient hotels.

1426 Q. With a class of hotels, you say? A. No; I say "with transient hotels".

Q. Oh, transient hotels? A. Yes.

Q. Is the Savoy-Plaza entirely a transient hotel? A. No, I would not say so.

Q. How much of it is transient? A. I don't know.

Q. What do you know about the Savoy-Plaza? A. It is on 59th Street and Fifth Avenue.

Q. Is that all you know? A. About.

Q. Now, do you know the incomplete items of work which were left undone in the Essex Hotel in the middle of December, 1930? A. I don't know.

1427 Q. Did you ever see a list of items, Exhibit No. 84—Plaintiff's Exhibit No. 84? That is Exhibit No. 85 that you have there? A. Yes, this is No. 85 that I have—Schedule B.

Q. Yes. Now, in the ordinary course of construction of a new building, Mr. Zilber, one trade has to wait upon another trade, has it not? A. Yes, sir.

Q. The steel is finished, and something else is started? A. Yes.

Q. And after that, something else is started? A. Yes.

1428 Q. And then something else still is started later, after that? A. Yes.

Q. Did you see the Essex Hotel in December, 1930? A. No.

Q. When did you see it? A. The first time I saw it was in August of 1931.

Q. And what was its condition then? A. I have seen a private job on the second floor, and I have seen a lot of working people working throughout the building in all kinds of trades.

Q. Now, take a 40-story building, such as the 1429
Essex House, and I now show you Plaintiff's Exhibit No. 84 (handing witness), and ask you to look at the items of work to be done there, and then say whether there would be any conflict between the different workmen there, or whether each particular trade could not have done its work at the same time with all the other trades? A. (After examining paper.) Well, let us say, window calking: When the windows have been calked, it means that the painter can not work there.

Q. He can not work there? A. In that particu-
lar room where the calker is working. The painter 1430
would not go in there unless all the mechanics are out—everybody concerned with that room had finished their work. I see here electric missing parts. I don't know what parts were missing.

Q. Neither ro I. A. What?

Q. I say, neither do I? A. And I see here Cranell, Nugent & Kranzer—I think they are furnishing material.

Q. Maybe we can make this a little quicker, Mr. Zilber. Will you go over that and then tell me in what respects one contractor's work could not be performed at the same time as another contrac-
tor's work? You have already mentioned that the 1431
calking could not have been on the windows at the same time that the painters were working in the room.

The Court: Well, of course, that would not mean that if calking was being done on the 14th floor, painting could not go on on the 32nd floor, for example?

The Witness: Yes, sir, it could.

1432 Mr. Murray: Yes.

The Witness: I see here another item, glass to be placed in mirrors, and glass. That means that the painter could not work on the trim.

Q. That is, at the very moment that the glass is being put in, you mean? A. Yes. All those items will interfere with some trades.

Q. What items? A. Like hardware missing; the painter would not be able to make a complete job of the room.

Q. But he could work in another room, though, 1433 if there were forty floors, could he not? A. Yes, but that costs much more if a painter has to go from one room to another—say, from the twelfth floor to the thirtieth floor—to do work, and then come back to the 12th floor. That disturbs the organization. I see, again, lighting fixtures missing, to the extent of $600—and that would be the same condition. The painters would not be able to work in those particular rooms.

Q. Yes? A. And I see plaster patching. The carpenter may not be able to finish his work, and the painter would not be able to go ahead with his work.

1434 Q. How much was the patching? A. The patching was about $436 for labor, and $55 for materials.

The Court: Mr. Zilber, in a hotel of forty stories, where there are, let us say, a dozen or more trades involved or required to complete the building, could not a general contractor or someone in charge arrange and dispose the various trades so that one section of the building could be carried on without being impeded by the other trades?

The Witness: Yes, but that would probably mean instead of doing the job in six months, it would probably take a year. 1435

The Court: I am glad I did not go into that business.

The Witness: There are a lot of items that will interfere with each other. A contractor would not be able to go ahead with his work.

Q. Let me ask you this: Could not every one of these trades have worked together at some time or other in that building? A. Yes, they could, but with a certain loss of time. 1436

The Court: I do not see how you figure out a loss of time. On the contrary, I should think that would save time.

The Witness: Your Honor, suppose there are thirty rooms on a floor in a hotel, and I send in—and everything is ready for me, and I send in men on one floor, twenty men, and they will do the work probably in a day and a half; but if I have to send in only a gang of ten men, and to disturb them, and say "You go to room 321", and "You go to room 325", and send another man to room 370, and so on, and I have got to watch at the same time that the men are working in different rooms throughout that entire area of the building— 1437

The Court: But you have forty floors, and you do not have to put your men on different floors, because you could put them all in one part of the building, or you could put them on ten consecutive floors—

The Witness: If I have to make a difference in the price—

1438 The Court: No; I am not talking about the cost. It might cost more, but you have said that instead of taking six months, it would probably take a year, and I do not see that at all.

The Witness: Well, that is the experience we have had in the construction line.

Q. Were you connected with Bing & Bing in 1931? A. What did you say?

Q. I say, were you connected with Bing & Bing in 1931? A. No, I was never connected with them.

Q. Were you connected with The Prudence
1439 Company? A. No.

Q. How did you come to go to this job in August, 1931? A. There was a dentist on the second floor—a dentist, a tenant on the second floor, who wanted to alter his office, and I got the job at that time through a friend of that dentist. I was a general contractor at that time. It was a private job.

Q. Have you at any time been all through that building? A. Before August, 1931?

Q. At any time. A. Not previous.

Q. Have you been there afterward? A. Yes.

Q. All through that building? A. Yes.

1440 Q. For the purpose of testifying here? A. To acquaint myself with the items I worked on—Schedule B.

Q. Have you ever done any work for Bing & Bing? A. No.

Mr. Murray: That is all, your Honor.

Mr. Schenck: That is all.

(Witness excused.)

ARTHUR S. LUKACH, recalled in rebuttal. 1441

Direct examination by Mr. Judd.

Q. Mr. Lukach, did you try to get anyone else to complete the work on the elevators in this building in the spring of 1931? A. I did.

Q. Did you succeed? A. I did not.

Q. I show you an agreement purporting to have been made on the 22nd day of April, 1931, between the 58-59 Realty Corporation and Otis Elevator Company, and ask you if that is the contract under which the Otis Elevator people completed the work (handing witness)? A. It is.

Q. And did you negotiate with them in order 1442
to obtain the lowest price? A. I did.

Q. Possible for that work? A. I did.

Mr. Judd: I now offer that contract in evidence.

Mr. Murray: May I see it, please?

Mr. Judd: Yes (handing paper to Mr. Murray).

(Marked Plaintiff's Exhibit No. 109.)

Q. Mr. Lukach, will you tell us what condition you found the refrigerating machine in when you entered the Essex House? A. When we were 1443
ready to start the refrigerating machine we found that the compressor evidently was not tight; that is, the piston was not tight to the walls of the compressor, and we had to take it down, and I observed myself that the entire interior of the cylinder was scored—

Mr. Murray (Interposing): Was what?

The Witness: Was scored, so that it was impossible to obtain proper compression.

1444 Q. And the amount which was spent to repair it was, in your opinion, a reasonable charge? A. It was.

Q. For that service? A. It was.

Q. Is there any or does the absence of radiators in interior bathrooms have any effect upon the value or the desirability of a hotel for residence purposes? A. Yes, it has a very definite effect.

Q. Well, will you tell us what that effect is? A. In practically all cases the interior bathrooms are adjoining bed rooms. During the cold months of the year, when the bedroom windows are open in the night time, an interior bathroom, even
1445 though the door is shut—because there is always a space between the door and the saddle or sill, and these interior bathrooms in the morning, when you get up, are almost as cold as the room itself. Tenants, I know, objected strenuously to this, and it was necessary to purchase a number of electric heaters to satisfy them. In other words, the average tenant who takes a suite in a hotel of the class of the Essex House demands a warm bathroom in the morning on a cold winter's day, so that he can dress and wash and shave and everything else in comfort.

1446 The Court: This is off the record.
(Informal discussion, off the record.)

Q. Will you tell us whether electric heaters, such as you have referred to, furnish a satisfactory substitute for radiators? A. They do not, for this reason—

Q. Why not? A. For this reason: in the first place you want your bathroom warm as soon as you get up in the morning, when you go in to it. An electric heater means that you either have to

plug in to the switch and wait, or, as I know a lot 1447
of tenants have done in some cases—because the hotel has to pay for this current—they leave the thing turned on all night—which means, of course, a tremendous outlay in current—since each one of these electric heaters consumes roughly as much current as ten 50-watt lamps would consume. A second thing is that it is a make-shift arrangement. The heater is just put on the floor, with a wire running from the heater up to a wall receptacle, and you are liable to stumble over it, and it is very unsightly. It is a make-shift at best.

Q. I show you now Plaintiff's Exhibit No. 85, the list of omissions and substitutions (handing 1448
witness). Will you tell me whether the omission of substitution of metal for wood stools and aprons has any effect upon the value or the desirability of an apartment hotel? A. Yes.

Q. What effect? A. The combination metal stools and aprons that were used in the Essex House are the type used in loft buildings. A wood stool and apron gives a much more finished appearance, and is the type that should be found in a residential dwelling.

Mr. Murray: I object to the answer and move to strike out "should be found". 1449

The Court: Motion denied.

Mr. Murray: Exception.

Q. I now call your attention to the item of closets in servants' rooms, and ask you whether the omission of closets in servants' rooms affects in any way the value or the desirability of a hotel? A. It definitely affects the value of the hotel.

Q. In what way? A. Because the management has to go out and buy portable wardrobes or

1450 closets to make up for the ones shown on the plans.

Q. There is an item to which I now call your attention of plastering, furring and lathing, some $2,392, representing the difference in cost between plaster and Keene Cement. Can you tell me whether there is any advantage in the use of Keene Cement? A. Yes, there is an advantage.

Q. And what is that? A. Keene Cement gives a very hard surface; it stands up under knocks and blows that the walls in the service section of a hotel would get every day. Ordinary plaster chips, and that means that the maintenance is
1451 much higher, because you have to patch and paint in those places.

Q. Have you examined the mirrors in the Essex House in the bed room doors? A. I have.

Q. There is an item in Schedule B representing the difference in cost between bevelled and straight mirrors. Will you tell us whether bevelling would impose in any way the mirrors of a hotel, in general? A. A bevelled mirror is always considered a much finer mirror than one without a bevel.

Q. In your opinion would these mirrors, if they had been bevelled, have been appropriate for the
1452 hotel and sufficient for a person to see himself? A. They would have.

Q. There is an item in Schedule A for calking windows. Will you tell us what the state of the windows was when you entered the building? A. There were spaced between the windows and the brick work, which had to be filled up in order to prevent the seepage of water; and these were filled with oakum and then a plastic cement. Also where two of the windows came together, in cases

of rooms where there were double windows, you could look through and see daylight through the space; and it was necessary to put moulding over all these junctions between two windows. 1453

Q. And is that in spite of this special weather-stripping about which testimony was given here? A. Yes, that was in spite of that special weather-stripping.

Q. Now, Mr. Murray has stated that he did not know what electric parts were missing, as shown on the list in Schedule A, which is Plaintiff's Exhibit No. 84. Can you tell us in detail what those parts were? A. Yes; switch-plates, switches, base-receptacles, base-plates, push-button at entrance doors; buzzers. In general, that is what they were. 1454

Q. In the letting of the painting contract, Mr. Lukach, can you tell us approximately how many estimates you obtained? A. Yes; I took eight estimates.

Q. And how did Mr. Landsman's estimate compare with the others? A. Mr. Landsman was the lowest.

Mr. Judd: That is all.

Cross examination by Mr. Murray.

1455

Q. You do not mean to say that Landsman's estimate was lower than Gladstone's, do you? A. After negotiations were completed, Landsman's estimate was lower than Gladstone's.

Q. Have you a copy of Mr. Gladstone's bid? A. I think it is here somewhere.

Mr. Murray: I call your Honor's attention in this Otis Elevator contract to labor and materials to be furnished by contractor, for

1456 furnishing all labor and material required to complete the original contract, covering all elevator signal systems, door-operating devices, and light equipment, without specifying just what the work was to be done.

The Court: Is it your contention that there was more work done than was called for by the original contract?

Mr. Murray: No. My contention is that—

The Court: Or that they have not proved that only that which was called for by the original contract was done?

Mr. Murray: That was all that was per-
1457 formed; but that the cost of performing that part of the work left undone was very much less than $14,500; and that what in reality was being done under that $14,500 contract was to pay the Otis Elevator Company for past due indebtedness which was owing by Central Park Properties; and that, therefore, $14,500 is not the fair value or the fair cost of doing what had to be done in order to put the elevators into operation. I think on Mr. Lukach's direct examination you will remember that there was something said that they had to pay Otis in order to get them to do
1458 the work, and something which was actually the cost of doing the work, and that he could not allocate that.

Q. When did you see the compressor first? A. Some time in the middle or latter part of the summer of 1931. I saw it immediately when I went into the building, and then made a closer examination and started running it.

Q. When did you first find out it needed some repair? A. At the time I have just stated.

Q. That is, in the middle of the summer of 1459
1931? A. Yes.

Q. And what do you mean when you say that the compressor was scored? A. I mean that there were grooves approximately one-eighth of an inch deep in the wall of the cylinder of the compressor.

Q. And what would ordinarily cause those grooves? A. Roughness or something abrasive or grit; something wearing on the wall.

Q. What effect did the grooves have upon the operation of the compressor? A. It could not function, because it would not compress the gas. It would just leak through those grooves.

Q. Would it operate at all? A. It would oper- 1460
ate, but not satisfactorily.

Q. You knew at that time who had put this in, did you not? A. Yes.

Q. Did you communicate with them? A. As I recall, I think they did—I think I did, yes.

Q. But you did not give them the job? A. I did not give them job, no.

Q. Did you know whether there was a guaranty made by them? A. I did not.

The Court: Did you get a bid from the original contractor?

The Witness: At the present time I am 1461
not sure. I think I did, and that their price was higher.

Q. Don't you know as matter of fact, Mr. Lukach, that no communication was ever had with the original installer of this equipment, and that if communication had been had with them, that they would have been glad to correct any fault that there was in this equipment, under their guaranty? A. I can not say as to that.

1462 Q. Will you show me on the exhibits in evidence where provision is made for interior radiators? A. Have you the heating plans, Mr. Judd?

Mr. Murray: What exhibit is that?

Mr. Judd: It is not an exhibit. I do not think it has been marked in evidence. It may have been.

Mr. Murray: Show me the original plans—Plaintiff's Exhibit No. 4, I think it was.

(Papers handed to Mr. Murray by Mr. Judd.)

Mr. Murray: No. It was Plaintiff's Exhibit No. 5.

1463

Q. Please point out to me where provision is made for radiators in interior bathrooms, on those plans (handing witness)? A. No radiators are shown on the architectural plans at all; always on the heating, mechanical plans. They are not on these plans.

Q. So there is no provision for radiators in those particular plans? A. There is no provision for any radiators in these plans (handing papers to Mr. Murray).

Mr. Murray: Now, please give me Plaintiff's Exhibit No. 4.

1464

The Court: Would the radiators be shown on those other specifications of the heating?

The Witness: They would be shown on the heating plans—the interior radiators. They would not be mentioned specifically, I don't think, in the specifications.

Mr. Murray: Of course, your Honor—well, I suppose that Mr. Braislin—am I correct in thinking that Mr. Braislin came back on the stand, and then remembered very distinctly

that those were among the specifications which he had approved? 1465

The Court: They were introduced or identified, but he testified that they were submitted at the same time.

Mr. Murray: Yes.

Q. Will you look at those specifications, now, Mr. Lukach, and point out where this provision for interior radiators is (handing witness)? A. I saw the interior radiators shown on the heating plan. The definite location of any radiators is not given in the heating specification.

Q. Then, there is no mention of interior radiators in that specification; is that correct? A. 1466
No, there is none. It simply refers to all radiators shown on plans.

Q. All right. I now show you from the original specifications No. 24, Article 13, and ask you to read what Article 13 says (handing witness). A. "Contractor shall submit additional price for furnishing and installing at all window openings in this contract interior metal window sills with radiator supports for phantom radiators."

Q. Now, will you find for me where it is specifically provided, in the face of that, that wooden sills shall be provided (handing witness)? A. 1467
Under the carpentry and mill work specification, Article 39, "Window Trim", it says, "This contractor shall furnish and install all window moldings, stools, and aprons for all metal windows, as shown or called on drawings and schedule sheet of white wood molded as shown or required."

Q. Now, do you claim that under this provision for the installing of metal windows at an additional cost, that there was a breach of the specifications when they did install wood sills? A. I don't understand. You said "metal windows"—

1468 Q. (Interposing.) Metal window sills—the article that you originally read. A. At additional cost?

Q. Yes. A. Additional to what cost? What do you mean? The wood sills would cost more. I don't understand. In addition to what?

Q. I don't know.

The Court: Well, the witness can not answer your question unless you put a question that you yourself understand.

Q. Well, there is a provision in here, is there not, Mr. Lukach, for the providing of metal win-
1469 dow sills? A. There is not a provision. It merely asks for an alternate figure to be submitted in the estimate or bid.

Q. All right. Metal window sills were provided, were they not? A. They were.

Q. What is the width of the mirrors in the bedroom doors? A. I can not give that to you exactly in inches.

Q. Well, how much does the bevel take off the width of a mirror? A. Half an inch on either side.

Q. That is, an inch altogether? A. An inch altogether.

1470 Q. Sometimes is it not very material to consider the width of the door in order to determine whether you are going to get a mirror as large as possible for the ladies who are going to use them? A. The doors in Essex House were of the average width; and, after all, you do not stand up within two or three inches of a mirror. You usually get back some distance into the room, and you can usually see yourself.

The Court: You were not providing for ladies of abnormal width?

The Witness: If I had been providing for them, it would have been different. 1471

Mr. Murray: That is all.

Redirect examination by Mr. Judd.

Q. At the time you entered into this contract with the Otis Elevator Company, did the representative of the Otis Elevator Company inform you that part of the cost was not for completing the contract, but was for the payment of sums due from Central Park Properties? A. He simply said that was the amount that would have to be paid to complete the contract according to the original plans and specifications. 1472

Mr. Judd: That is all.

(Witness excused.)

Mr. Schenck: The plaintiff rests. Now, if your Honor please, I wish to make a motion, suggested earlier in the trial, to conform the pleadings to the proof in respect of Exhibits A and B.

(The Court granted the motion.)

Mr. Schenck: I have prepared a little memorandum on the evidence, which is quite general in character and refers to several authorities that I think have some bearing upon the weight of evidence. 1473

Might I now submit, in connection with the plaintiff's motion for the direction of a verdict, a summary of amounts and the interest items, and suggest, for the purpose of clarity, that if entirely convenient to your Honor, the verdict, if in favor of the plaintiff, might be in the specific component amounts as divided between Schedules A and B, and certain other

1474 items that have been referred to in the evidence. I merely suggest this as a method of determination. We have here Schedule A with a certain interest date from which we calculate interest. There are certain items of taxes from the date of the payment of which we are claiming interest; and in respect to other items they are quite confusing, so far as amounts are concerned,—that is, to have an interest item from each and every date, as the bond specifically provides; and we have, therefore, suggested that our interest date in respect of those amounts be figured from the
1475 last date of payment—approximately the 1st of October, 1931.

Then, our Schedule A items would have a different interest date, and that, therefore, in order to avoid any possible confusion, we suggest that the component parts of the verdict be separately stated,—if that is entirely convenient to your Honor?

The Court: Yes, that would be the better way, I think.

Mr. Schenck: Yes.

The Court: I think you ought to consider this question: as to whether, assuming that a
1476 verdict be directed for the plaintiff, the sum could be in excess of the deficiency judgment?

Mr. Judd: I do not believe our total comes to more than that, except for the addition of interest subsequent to—

The Court (Interposing): You are asking here for $830,000-odd—

Mr. Judd (Interposing): But that includes $75,000 of interest. $119,000 of it is interest.

The Court: It is not important, just for the moment, to determine upon any figure, but I

just want you to consider the principle in- 1477
volved. It seems to me that that Westcott case indicates pretty clearly that the limit of your recovery would be the deficiency judgment; and if you are going to urge a contrary view, then I would like to have authorities. If, on the other hand, you agree to that view of the case, then it is not necessary to give further consideration to it.

Mr. Schenck: As I stated at the beginning of the case, although we had two theories indicated in our complaint, we had considerable doubt with regard to the second of the two theories; and that we were not going to ask 1478
any judgment that involved any element of doubt; and we were, therefore, going to restrict the amount that we were asking under our first cause of action to an amount that would not exceed the amount under the second cause of action; and I think I can state now —although I should be glad to consider it further—that we shall not ask any amount in excess of the amount of the deficiency judgment. This matter of interest may enter into it somewhat, but I shall be prepared tomorrow, at any rate, to be specific and definite in
that respect; and if we do ask for anything in 1479
excess of the deficiency judgment, it will only be on the basis of authorities that clearly justify it.

Mr. Murray: If your Honor please, I suppose it would be in order for me at this time to renew the motion to dismiss the complaint, on the ground that no cause of action has been stated, and upon the further ground that no damages have been proven upon the part of the plaintiff.

Motion to Direct Verdict

1480 The Court: I will deny the motion.

Mr. Murray: Exception.

Mr. Schenck: If your Honor please, yesterday I handed up a little specification of our claims, but I neglected to make in terms a motion for a direction of a verdict. I now upon the pleadings and proof herein, and upon the stipulation herein dated the 7th of May, 1934, and upon all papers and proceedings had herein, move that this Court direct a verdict in favor of the plaintiff, for the sum of $830,086.69.

The Court: I will reserve decision on that
1481 motion.

Mr. Schenck: Of course, in making a motion for a specific amount I am giving the extent of our claim. Our claim is unliquidated in regard to Schedule A and in regard to Schedule B, and I make the motion deeming that the proofs establish a damage in that amount. I also have considered, as stated at the very opening, a reduction of our claim, and your Honor will recollect that a number of items have been eliminated from Schedules A and B so that the full amount of our claim is now under the amount of the deficiency judg-
1482 ment, the interest on the deficiency judgment also making the sum total of deficiency judgment plus interest in excess of the sum total of all the items of our damage, plus interest.

Both sides summed up and the Court took the case under consideration.

In the course of the closing argument Mr. Murray conceded that the certificate of occupancy (Exh. 39) was not a certificate of completion.

Stipulation and Order Settling Bill of Exceptions.

1483

IT IS HEREBY STIPULATED AND AGREED, that the foregoing bill of exceptions, together with the exhibits therein mentioned, which are to be annexed hereto and deemed a part hereof, contain all of the evidence taken on the trial of the action and all proceedings in connection therewith which are material to said exceptions and that the same may be settled and ordered on file as the bill of exceptions herein with the same force and effect as if each exception were signed separately, and ordered *nunc pro tunc* as of June 14, 1934, the date of the entry of judgment in the action.

1484

Dated November 13, 1934.

ALFRED T. DAVISON,
Attorney for Plaintiff.

THOMAS E. WHITE,
Attorney for Defendant.

Upon reading the foregoing stipulation, it is ordered that the foregoing Bill of Exceptions, together with the exhibits therein mentioned, which are to be annexed hereto and deemed a part hereof, contain all of the evidence taken on the trial of the action and all proceedings in connecition therewith which are material to said Exceptions; and the same is hereby settled and signed with the same force and effect as if each Exception was signed separately, and ordered *nunc pro tunc* as of June 14, 1934, the date of the entry of judgment in the action.

1485

Dated November 13, 1934.

CLARENCE G. GALSTON,
United States District Judge.

Request for Direction of Verdict.

1486

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[L-52-110]

THE PRUDENCE COMPANY, INC.,
Plaintiff,

against

FIDELITY AND DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE,
Defendants.

1487

Upon the pleadings and proof herein, and upon the stipulation herein dated May 7, 1934, and upon all papers and proceedings had herein, the undersigned hereby requests this Court to direct a verdict in favor of plaintiff for the sum of $830,086.69, made up as follows:

1. The amount shown in Exhibit 84 (payments in completion) together with interest on:	$210,999.73
(a) the sum of $38,080 (first half of taxes) from May 28, 1931 to May 15, 1934	6,773.02
(b) the sum of $19,040 (second half of taxes) from November 28, 1931 to May 15, 1934	2,810.61
(c) the sum of $153,879.73 from October 1, 1931 to May 15, 1934	24,182.30
Total of subdivision 1	$244,765.66

2.	The amount shown in Exhibit 85 (omissions and substitutions)	$185,842.28	1489
	together with interest thereon from December 16, 1930 to May 15, 1934	38,034.03	
	Total of subdivision 2	$223,876.31	
3.	The amount of interest lost by plaintiff, as alleged in paragraph XXXVII (3) of the complaint (interest on $6,575,000 from December 16, 1930 to October 1, 1931	$312,357.53	1490
	together with interest thereon from October 1, 1931 to May 15, 1934	49,087.19	
	Total of subdivision 3	$361,444.72	

The undersigned further requests that the verdict directed pursuant to this request shall state separately the amounts awarded in respect of subdivision 1, 2 and 3 above; and that the judgment to be entered upon such verdict shall include interest on the total amount of the verdict from May 15, 1931, to the date of entry of such judgment, regardless of the actual date of rendition of the verdict. 1491

Dated, New York, N. Y., May 14, 1934.

Respectfully submitted,

ALFRED T. DAVISON,
Attorney for Plaintiff,
Office and P. O. Address:
2396 Third Avenue,
Borough of Manhattan,
City of New York.

Opinion of Judge Galston, Dated June 6, 1934, After Trial of Action.

1492

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

(L-52-110)

THE PRUDENCE COMPANY, INC.,

Plaintiff,

against

FIDELITY AND DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE,

1493

Defendants.

June 6, 1934.

ALFRED T. DAVISON, Esquire, Attorney for Plaintiff (Martin A. Schenck, Orrin G. Judd, Ralph C. Williams, Jr., Esqs., of Counsel)

THOMAS E. WHITE, Esquire, Attorney for Defendants, (Joseph F. Murray, Esquire, of Counsel)

1494

GALSTON, D. J.

By stipulation this cause was tried by a jury of one.

On September 24th, 1929, the plaintiff and the Central Park Properties, Inc. entered into a building loan agreement, by the provisions of which The Prudence Company agreed to lend the sum of $6,650,000. This loan was to be secured by a bond and mortgage as a first lien upon premises on the south side of West 59th Street in the City of New York.

The borrower agreed to erect, according to the plans and specifications submitted and approved in writing by The Prudence Company, a modern forty story and basement fireproof hotel containing 1269 rooms and 687 bathrooms, together with the usual equipment installed in buildings of that type, but not including hotel furniture and furnishings. This building will hereafter be referred to as "The Essex House." 1495

It was agreed that the building was to be completed and ready for occupancy by December 16th, 1930.

The building loan agreement contained the following clause: 1496

> "The Borrower shall furnish to the Lender a surety bond in the amount of $3,000,000., in a company satisfactory to Lender, to be in form and contents satisfactory to Lender, conditioned upon and guaranteeing completion of said building within the time hereinafter specified in strict accordance with said plans and specifications and this agreement and free from claims of liens."

In pursuance of the foregoing provision of the building loan agreement, the borrower procured for the plaintiff the bond of the defendants herein in the amount of $3,000,000, conditioned upon and guaranteeing the completion of the building described in the building loan agreement not later than the 16th day of December, 1930, in strict accordance with the plans and specifications of the building loan agreement and free from claims of liens. 1497

The surety bond contained, among others, the following provisions:

1498 "and said building loan agreement and all and singular the terms thereof are hereby made a part of this bond by reference thereto with the same force and effect as if set forth in full in the body hereof."

"No changes from said plans and specifications above referred to, including any changes in the design or cubic contents of or the materials or equipment in said building or in the performance of the work of construction of said building, and no delay, neglect or failure of the Obligee to proceed promptly or otherwise to enforce the completion of said build-
1499 ing by the Principal or enforce any remedy it may have against the Principal, and no act done or omission of or action or proceeding taken by the Obligee in case of any default by the Principal, shall in any respect release or relieve the Principal or Surety from their obligations hereunder (which shall also include all such changes.)"

At or about the time of the execution of the building loan, advance payments totaling $3,250,000 were made to the borrower. From then on various other advances were made, bringing the
1500 total to $6,650,000, of which the sum of $75,000 was deposited by the Central Park Properties, Inc. with The Prudence Company for the purpose of meeting various expenditures in connection with the completion of the building; and the said sum of $75,000 was thereafter applied by the plaintiff on account of the said principal sum of $6,650,000.

The plaintiff's cause of action arises out of the failure of the borrower to complete the building

and have it ready for occupancy as a modern hotel on or before December 16th, 1930. 1501

On December 23rd, 1930, the Central Park Properties, Inc. abandoned the completion of the building leaving it in an unfinished state. The plaintiff also alleges that the Central Park Properties, Inc. did not construct and complete the building in accordance with the plans and specifications of the building loan contract; and the defendants, it is alleged, have not made good the defaults on the part of the Central Park Properties, Inc. In consequence, the plaintiff employed contractors to complete the building in general accordance with the plans and specifications of the building loan 1502 agreement, and it was made ready for occupancy on or about the 1st day of October, 1931.

The plaintiff alleges that it has expended certain sums for labor and materials in completing the building; and that also by reason of the omissions of labor and material called for by the building loan agreement and the plans and specifications and because of substitutions made by the Central Park Properties, Inc. of inferior materials, plaintiff was additionally damaged in that it was compelled to pay taxes, and suffered loss of interest, making total damages of $830,086.69, 1503 which sum includes interest to May 15th, 1934.

The defendants interposed a general denial and also set up ten separate defenses, of which, however, the 1st, 2nd, 3rd, 4th, 5th, 7th, 8th and 9th were stricken out on plaintiff's motion before trial. Prudence Company v. Fidelity and Deposit Company of Maryland, et al., 2 Fed. Supp. 454.

The 6th defense alleges that on the 5th day of December, 1930, the plaintiff and the Central Park Properties, Inc. agreed that all the work required

1504 for the completion of the building provided for in the building loan agreement had been done except work which could be completed for the sum of $75,000 and that by the deposit of that sum the liability of the defendants on their bond was released and discharged.

The 10th defense is that the omissions of items and the substitution of materials, of which the plaintiff complains, were made with the knowledge and approval of the plaintiff; and that accordingly the plaintiff waived strict performance of the terms and provisions of the building loan agreement, and the plaintiff is estopped thereby 1505 from alleging that these omissions and substitutions were contrary to the plans and specifications and to the said building loan agreement.

At the opening of the case the defendants' counsel asserted a defense of fraud. This defense was not proved.

Exhibit 84 sets forth a list of payments made by The Prudence Company in completing the building. The reasonableness of some of these items is challenged. It includes a painting expenditure of $72,882. It is claimed that this is an excessive amount; and that at the time of final payment by 1506 The Prudence Company, the painting was separated from the other items, and it was estimated that $25,000 would cover the cost of completion of the painting. Defendants also emphasize the fact that the plaintiff's inspectors reported that $14,000 would be sufficient to complete the painting. As against that, however, we have the testimony that what was done was in strict compliance with the provisions of the building loan agreement and the plans and specifications, with the exception that there was included a removal of molding

and repainting necessitated by such removal. 1507
However, the net figure of $71,650 is arrived at after having made suitable deduction for such labor and material as were not called for by the plans and specifications. It nowhere appears that either Schermerhorn or Billsborrow, plaintiff's inspectors, submitted detailed estimates in respect to the job, at the time that it was estimated that but $14,000 would be required to complete the painting. It is argued that this and other items were reckless expenditures because the total amount so expended was so vastly in excess of early estimates.

It is unreasonable to believe that The Prudence 1508
Company deliberately went out of its way to complete the building at a cost in excess of that actually demanded by the condition of the building when it was abandoned by the Central Park Properties, Inc. The best evidence of the cost is what The Prudence Company was compelled to pay; and in the absence of proof that the same work could have been done at a substantially lower figure, and particularly in the absence of any proof that the work was not justified by the plans and specifications and the building loan agreement, and since the plaintiff has sustained its bur- 1509
den of proof, the figure as to the painting must be accepted. This same principle must be followed in respect to all the other items entering into the schedule of completion. The third paragraph of the bond is important in this regard:

> "THIRD: Should the Obligee give the Surety written notice of any default of the Principal as aforesaid, and (1) should the Surety for twenty days after receipt of such notice fail to diligently proceed with or pro-

1510 cure others to diligently proceed with the construction and completion of said building and the supplying and installation of said equipment therein, * * * the Obligee * * * may construct and complete such building in general accordance with said building loan agreement and plans and specifications as the same may be changed from time to time, and/or may employ a contractor, subcontractors, architects, superintendent, * * * and the Principal and Surety jointly and severally agree to repay to the Obligee on demand any and all sums of money paid by the
1511 Obligee for the purposes authorized by this paragraph, with interest at the rate of six per centum per annum from the time or times of any such payment or payments made by the Obligee."

The defendants contend that the plaintiff is not entitled to reimbursement for electric current, insurance, steam consumption, taxes and telephone set forth in Schedule A (plaintiff's Exhibit 84), because they were not payments made in completing the building.

As to the telephone charge amounting to
1512 $204.62, there is force in the suggestion because there is no proof that this service was necessary to complete the building. This is not true of the item of electric current, for obviously current was necessary for light in which to work and for operation of the elevators. For similar reasons the amount paid for steam consumption was necessary to complete the building. Steam was necessary to enable the workmen to work with some degree of comfort, and for preservation of the building.

Expenditures for insurance and taxes are 1513
chargeable against the surety, as was indicated in Trainor Co. v. Aetna Casualty Co., 290 U. S. 47, in which it was said:

> "In the meantime, the uncompleted buildings necessarily lay unrented, subject to expense in the way of taxes, insurance, accumulating interest, etc., deteriorating in quality and steadily declining in value. Petitioner is entitled to be put in as good position in respect of its debt as it would have occupied if the buildings had been completed in accordance with the terms of the undertaking; 1514
> and this can be done here only by giving it the amount of the difference between the value of the unfinished buildings and their value as it would have been if completed in accordance with the agreement—see Kidd v. McCormick, supra, p. 398—but exceeding neither the amount due on its debt nor the amount of the bond."

Moreover, paragraph Ninth of the building loan agreement provides:

> "The lender may apply any part of any advance in payment of interest or taxes due 1515
> and the amounts so applied shall be deemed advanced to the borrower."

It is thus obvious that the building loan agreement specifically contemplated the payment of taxes pending completion. These obligations become the obligations of the surety, for the surety bond provides that if the surety exercises the right to complete, then the obligee shall place at his disposal any unadvanced amounts of money

1516 which would have been received by the principal "with the same requirements * * * as to payment of interest, taxes, insurance, premiums and otherwise, as if such obligations were in fact made by the Principal * * *"; and all monies required to cure any default, which of course includes a default as to interest, taxes or insurance, shall be furnished by the principal or surety. The bond states:

> "The provisions of this paragraph 'Second' shall not in any event relieve the Surety from performance of any of its obligations
1517 under this bond, and all monies required to cure any default shall be provided by the Principal and/or Surety."

Paragraph Fourth of the bond also imposes this same obligation upon the surety company in respect to taxes, for it provides:

> "In the event that there are at any time any liens * * * or claims of record * * * against the premises * * * the Surety agrees at its own expense to remove the same * * * and in default thereof, the Obligee may cause such removal * * * by pay-
1518 ment * * * and the Surety shall repay to the Obligee any monies expended by the Obligee in payment."

In Kidd v. McCormick, 83 N. Y. 391, cited in Trainor Co. v. Aetna Casualty Co., supra, it is said:

> "The work needed to complete was one of time; and while the time was running, interest was running also, taxes were levied, insurance was to be kept up, and the premises

were yielding no rent. It is plain that to repay him just what he expended to finish the buildings would not make him whole; for he had to pay, besides the cost of the building, interest to Granniss, and lose interest on his own mortgages, and pay taxes and premiums." 1519

Defendants also oppose any recovery for interest. This item is in the sum of $312,357.53, being the amount of interest of which it was deprived from December 16, 1930 to October 1st, 1931, the date of completion. This sum represents the interest on $6,575,000 for that period. The effective dates, it will be recalled, designate respectively the date on which the hotel, according to the building loan agreement and surety bond, was to have been completed, and the latter date, the date of actual completion. 1520

The defendants' contention would seem adequately to be disposed of under the authorities cited, Kidd v. McCormick, 83 N. Y. 391, and Trainor Co. v. Aetna Casualty Co., 290 U. S. 47.

The payment to the Otis Elevator Company of $14,500 for finishing the work according to the original contract, and of $395 for removing and reinstalling the pit equipment to permit the waterproofing of the elevator pits, are challenged as being unreasonable. However, had this work been done by some other contractor, the probability is that the practical value of the guaranty clause in the contract between the Central Park Properties, Inc. and the Otis Elevator Company would have been impaired. The elevators were incomplete on December 16th, 1930. There was owing from the Central Park Properties, Inc. on the Otis Elevator Company contract and to that company a 1521

1522 sum in excess of $80,000, and a conditional bill of sale had been filed by the Otis Elevator Company. Notice of this was given to the sureties, the defendants herein, on January 13th, 1931. Nothing was done by the defendants to meet the situation, and the full amount was owing to the Otis Company on April 15th, 1931. Bing and Bing, as contractors for The Prudence Company, endeavored to get other contractors to complete the work on the elevators, but for ample reason, employed the Otis Elevator Company to complete the installation.

Objection is made to the item of $608, for level-
1523 ing cement floors. This was certainly a proper item because the cement specifications required that the floors "be worked to a level and true surface."

Waterproofing of the elevator pits is objected to, but one of the reports shows that after the waterproofing, water had seeped through.

The window caulking was necessary because it was found that the windows leaked.

Item No. 10, for replacing mirrors and glass, is objected to. The objection in part is sustainable because $345.26 was paid for replacing bro-
1524 ken lights. This item is disallowed.

Likewise item 20, a claim for $295, for repair work to kitchen equipment, is disallowed, as it was for repair work without sufficient explanation as to its having been originally defective.

On the other hand, the item of $1232 for rekalsomining 154 ceilings is justified.

As to repairing the compressor in the refrigerating system, the testimony shows that that was necessary because of original defects.

The charge of $700 for insulating ceiling of steam and incinerator rooms is not justified, and the item is disallowed. 1525

There remains for consideration Exhibit 85, which is an itemization of labor and materials omitted by the Central Park Properties, Inc. and not supplied by The Prudence Company, Inc.; and also substitutions by the Central Park Properties, Inc. of materials inferior to those called for by the plans and specifications.

In Paragraph Third of the bond is found this provision:

> "If at any time the Obligee shall take over the work of constructing and completing said building, supplying or installing such equipment, it is understood and agreed that the Obligee does not thereby assume any obligation to complete the said building, and the right of the Obligee to repayment from time to time for moneys expended hereunder, with interest, shall not in any case be affected by any failure on its part to complete the said building, nor shall the Surety be thereby released from its obligation to complete and equip said building." 1526

In Board of Education v. Maryland Casualty Company, 27 Fed. (2d) 20, the action was against the surety on a building contract to recover for the contractor's default. As in the case at bar, a bond was given to assure performance of a contract, or else to respond in damages. The court said: 1527

> "As the contractor failed to perform, its surety may be called upon at once to pay the damages without waiting for the completion

of the building by the owner or another party. Indeed the building may never be completed, for, unless otherwise provided by the contract, the owner is not required to complete the work abandoned by the contractor as a condition precedent to recovery on a bond of assurance, Wills v. Peace Creek Drainage District, 4 F. (2) 519; National Surety Co. v. City of Huntsville, 192 Ala. 82, 68 So. 373; Newton v. Consolidated Constr. Co., 184 Mich. 63, 150 N. W. 348; King v. Nichols, 53 Minn. 453, 55 N. W. 604; Simons v. Wittmann, 113 Mo. App. 357, 88 S. W. 791; Cinn. Ry. v. Carthage, 36 Ohio St. 631, yet the surety will be liable for damages occasioned by the breach."

The defendants' position is that there has been no proof offered by the plaintiff that the value of the building has been decreased by the omissions and substitutions set forth in Exhibit 85.

The principle is stated in Jacob & Youngs v. Kent, 230 N. Y. 239:

> "The owner is entitled to the money which will permit him to complete, unless the cost of completion is grossly and unfairly out of proportion to the good to be attained. When that is true, the measure is the difference in value."

The reasonableness of this principle as applied to the facts of this case is obvious. The arrangement between the Central Park Properties, Inc. and The Prudence Company contemplated the advancing of sums aggregating $6,650,000 for the

erection of a building according to the plans and specifications forming part of the building loan contract; and if this were not enough, we find in the contract, which measures the rights of the parties to this litigation, a guaranty that the erection will be in strict conformity with those plans and specifications. Any departure therefrom must, therefore, be at the risk of the obligors, unless indeed they obtained a waiver or a consent in writing, as provided by the contract. There is no proof that either was obtained. Any substantial variance, therefore, and I mean by that, any variance other than a mere inconsequential departure from the plans and specifications, must be charged against the obligors. The schedule in question, therefore, presents in the main valid items of damage. 1531 1532

Merely because advances were made by the plaintiff to the Central Park Properties, Inc. after plaintiff's inspectors and even its vice-president presumably were aware of the substitutions, neither limits the plaintiff's rights nor enlarges the defendants'. The building loan agreement provides:

> "The making of any advance or any part of an advance shall not be deemed an approval or acceptance by the Lender or the holder of the mortgage of the work theretofore done." 1533

The defendants argue that article 15 of the general conditions included in the contract made permissible changes in the plans and specifications without the written consent of the plaintiff. But, clearly, those provisions concern the owner, con-

1534 tractor and architect. It would be against all reason to assume that a lender would permit a borrower to make changes in plans and specifications without affecting the amounts to be advanced, and, of course, would be in entire contradiction of the effect of the clause in the bond that the building be erected in strict accordance with the plans and specifications. Such an interpretation as defendants insist on would vitiate the surety bond.

Other provisions also of the building loan agreement, knowledge of which, of course, is chargeable to and binding upon the surety companies, make
1535 clear that article 15 is not intended to relieve the Central Park Properties, Inc. from the strict performance with the plans and specifications. For example, in article 8th therein, the lender is given discretion to withhold advances "if the borrower does not erect said building strictly in accordance with plans and specifications, approved in writing by the lender."

In article 17th is the provision that "the Borrower agrees to erect * * * according to the plans and specifications prepared by Frank Grad, architect * * * heretofore submitted to the Lender, and
1536 amendments thereto made by the Lender in a memorandum dated September 24th, 1929, and initialed by the Lender and Borrower."

Now as to specific items mentioned in Exhibit 85, to which defendants point criticism:

Lighting fixtures: Plaintiff claims $26,900, as the difference between the amount actually spent by the Central Park Properties, Inc. for lighting fixtures and the amount which the specifications

called for as lighting fixture expense. Section 4 of the specifications reads as follows: 1537

> "Cash allowances. The general contractor shall include in his estimate the following cash allowances for the features enumerated:
> Lighting fixtures, installed, connected, and including connection fees, $50,000."

The defendants' broad interpretation that a discretion was vested in the owner to install equipment at a lesser cost would have considerable force were it not that a standard of comparison had been set up by the parties themselves.

In the loan acceptance, defendants' Exhibit A, it is stated that: 1538

> "Said building and the materials and workmanship therein contained, shall be in all respects a first-class apartment hotel."

A. E. Lefcourt, writing on February 5th, 1930 to The Prudence Company, said:

> "I believe that the Savoy-Plaza, where I have been living for the past three years, is a fair example of what is being done and built in up-to-date apartment hotels."

The proof in the case is that the electric fixtures were not equal to those of the Savoy-Plaza. It follows that if fixtures such as were suitable for a first-class hotel or one that conformed with the standards of the Savoy-Plaza Hotel could have been purchased for less than $50,000, the plaintiff would have had no cause of complaint and would have suffered no damage; since, however, fixtures 1539

1540 of an inferior grade were supplied, the item under objection must be allowed..

The item in respect to medicine cabinets follows the same analysis. They were not up to the standard specified, inasmuch as they were inferior in quality as to the mirrors, weight of metal and enamel work. That item too must be allowed.

Neither the plans nor the specifications nor anything in the building loan agreement specifies the installation of interior bathroom radiators; and the item appearing in Exhibit 85, "Radiators omitted in 568 interior bathrooms, $25,000" will not be allowed.

1541 Finally, as to the defense of compromise, it is contended that the withholding of $75,000 on December 5th, 1930 for the purpose of completing the building was in effect a compromise between the parties. This is urged as a defense of accord and satisfaction. It may be noted that the defense is not pleaded. On the contrary, paragraph Fourth of the defendants' answer treats the item quite differently, in alleging that the Central Park Properties, Inc. deposited that sum with the plaintiff, which was "thereafter appropriated by plaintiff for payment on account of said $6,650,000."

1542 Nor does the proof show that by the deposit of $75,000 from the final payment of $300,000 made by the plaintiff on December 5th, 1930, it was by way of accord and satisfaction.

The applicability of Smith v. Alker, 102 N. Y. 87, Wyckoff v. Meyers, 44 N. Y. 143, Hart v. City of New York, 201 N. Y. 45, and Bell v. Fox, 138 App. Div. 569, is not seen.

The case at issue is not one between owner and builder; and there was no undertaking by The Prudence Company that with the amount deposited there was a release of all or any claims. Indeed, the proof would indicate that the amount so deposited was the result of general estimates on the subject of completion. There is no certification by the architect or anybody else in the case at bar that the building was completed. The parties attempted to facilitate the work of completion by effecting the deposit. It is very likely true that The Prudence Company could have withheld the entire $300,000, which it made as a final advance on December 5th, 1930, but to have done so might have precipitated the filing of liens by materialmen and sub-contractors, who, the evidence discloses, were at the time unpaid. Because it seemed to The Prudence Company the wiser policy to endeavor to stave off disaster is no reason for concluding that by accepting a deposit of $75,000 for completion work it was waiving any claim whatsoever. There was no payment by the Central Park Properties, Inc. or any consideration given for an accord and satisfaction. Hudson v. Yonkers Fruit Co., 258 N. Y. 168. 1543 1544

In accordance with the foregoing opinion, a verdict in favor of the plaintiff is directed for the sum of $798,416.81, as follows, with interest from May 15th, 1931 to the date of the entry of judgment on the verdict: 1545

1.	The amount shown in Exhibit 84 (Payment in completion) less		
	telephone item of	$204.62	
	broken glass	345.26	
	repair work to kitchen equipment	295.00	
	insulating ceilings	700.00	$209.454.85

1546	together with interest on:—	
	(a) the sum of $38,080 (first half of taxes) from May 28, 1931 to May 15, 1934	6,773.02
	(b) the sum of $19,080 (second half of taxes) from November 28, 1931 to May 15, 1934	2,810.61
	(c) the sum of $153,879.73 from October 1, 1931 to May 15, 1934	24,182.30
	Total of subdivision 1	$243,220.78
	2. The amount shown in Exhibit 85 (omissions and substitutions) less the item of $25,000 for radia-	
1547	tors for interior bathrooms	160,842.28
	together with interest thereon from December 16, 1930 to May 15, 1934	32,909.03
	Total of subdivision 2	$193,751.31
	3. The amount of interest lost by plaintiff, as alleged in paragraph XXXVII (3) of the complaint (interest on $6,575,000 from December 16, 1930 to October 1, 1931	$312,357.53
	together with interest thereon from October 1, 1931 to May 15,	
1548	1934	49,087.19
	Total of subdivision 3	$361,444.72

CLARENCE G. GALSTON,
U. S. D. J.

Notice of Motion to Strike Out Defenses from Answer.

1549

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE PRUDENCE COMPANY, INC.,

Plaintiff,

against

FIDELITY AND DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE,

Defendants.

1550

PLEASE TAKE NOTICE that on the affidavit of Frank Fox, sworn to May 17, 1932, and on the original Building and Loan Agreement, executed and delivered on September 24, 1929, to be produced by plaintiff upon the argument of this motion, a copy of which is annexed to the annexed affidavit of Frank Fox, sworn to May 17, 1932, and on the original bond, executed and delivered by defendants as sureties on September 25, 1929, a copy of which is annexed to the annexed affidavit of Frank Fox, sworn to May 17, 1932, and on the affidavit of Clemens F. Schmitz, sworn to May 17, 1551
1932, and on the complaint herein, verified February 18, 1932, and on the answer of the defendants herein, verified April 29, 1932, the plaintiff will move this Court at a Term thereof for the hearing of motions to be held at Room 235, United States Post Office Building, Borough of Manhattan, City, County and State of New York, on

1552 the 24th day of May, 1932, at 10:30 o'clock in the forenoon or as soon thereafter as counsel can be heard, for an order striking out as sham and frivolous each and every denial contained in subdivisions marked "First", "Second", "Third" and "Fifth" of the answer of the defendants herein, and also for an order striking out the First, Second, Third, Fifth, Seventh, Eighth, Ninth and Tenth Separate and Distinct Defenses contained in the answer of the defendants herein, on the ground that each such defense is insufficient in law, and also for an order granting to the plain-
1553 tiff such other and further relief as may be just and proper in the premises.

Dated, New York, May 17th, 1932.

Yours &c.

ALFRED T. DAVISON,
Attorney for Plaintiff,
Office and Post Office Address,
2396 Third Avenue,
Borough of Manhattan,
City of New York.

To:

1554 THOMAS E. WHITE, Esq.,
Attorney for Defendants,
55 Liberty Street,
New York, N. Y.

Affidavit of Frank Fox, Annexed to Foregoing Notice of Motion.

1555

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE PRUDENCE COMPANY, INC.,

Plaintiff,

against

FIDELITY AND DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE,

Defendants.

1556

STATE OF NEW YORK,
CITY OF NEW YORK } ss.:
COUNTY OF KINGS,

FRANK FOX, being duly sworn, deposes and says: I am a Vice President of The Prudence Company, Inc., the plaintiff in the above entitled action.

Annexed hereto and marked "Exhibit A"* is a correct and true copy of the Building Loan Agreement executed and delivered by the plaintiff and Central Park Properties, Inc., and referred to in subdivision marked "III" of the complaint herein.

1557

Annexed hereto and marked "Exhibit B"** is a correct and true copy of the surety bond executed

* The Building Loan Agreement which is Exhibit A here referred to is printed as Plaintiff's Exhibit 1 on page 567 of this record.

** The Surety Bond which is Exhibit B here referred to is printed as Plaintiff's Exhibit 2 on page 591 of this record.

Affidavit of Frank Fox, Annexed to Foregoing Notice of Motion

1558 and delivered by the defendants on or about September 25, 1929, and referred to in subdivisions marked "IX", "X", "XI", "XII", "XIII", "XIV", "XV" and "XVI" of the complaint herein.

FRANK FOX

Subscribed and sworn to before me this 17th day of May, 1932.

BELLE R. NELKIN
Notary Public, Kings County.

1559

Affidavit of Clemens F. Schmitz, Annexed to Foregoing Notice of Motion.

[SAME TITLE]

STATE OF NEW YORK,
CITY OF NEW YORK, } ss.:
COUNTY OF KINGS,

1560 CLEMENS F. SCHMITZ, being duly sworn, deposes and says: I am President of Remsen Brokerage

Affidavit of Clemens F. Schmitz, Annexed to Foregoing Notice of Motion

1558a

Company, Inc., and am the person who arranged for the giving of the bond by the defendants above named to The Prudence Company, Inc., which bond was dated September 25, 1929, and is the bond referred to in subdivisions marked "IX", "X", "XI", "XII", "XIII", "XIV", "XV" and "XVI" of the complaint herein.

I personally know that I gave and delivered to the defendants a copy of the Building Loan Agreement dated September 24, 1929, between the Central Park Properties, Inc. and The Prudence Company, Inc., which Building Loan Agreement is referred to in subdivision marked "III" of the 1559a complaint herein, a copy of which said Building Loan Agreement is annexed to the annexed affidavit of Frank Fox, sworn to May 17, 1932, and I left with the defendants a copy of said Building Loan Agreement, before delivery of said bond to plaintiff.

CLEMENS F. SCHMITZ.

Subscribed and sworn to before me this 17th day of May, 1932.

BELLE R. NELKIN,
Notary Public, Kings County.

1560a

Stipulation *Re* Exhibits Annexed to Notice of Motion.

1558b

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE PRUDENCE COMPANY, INC.,

Plaintiff,

against

FIDELITY AND DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE,

Defendants.

1559b

IT IS HEREBY STIPULATED, CONSENTED AND AGREED that Exhibit A annexed to the plaintiff's notice of motion herein dated May 17, 1932, is a correct and true copy of the Building Loan Agreement made September 24, 1929, between Central Park Properties, Inc. (therein referred to as "Borrower") and The Prudence Company, Inc. (therein referred to as "Lender"), and referred to in the complaint herein as "the Building Loan Agreement", and that Exhibit B annexed to plaintiff's notice of motion herein, dated May 17, 1932,

1560b is a correct and true copy of the Surety Bond

1561

dated September 25, 1929, executed by Central Park Properties, Inc. (therein sometimes called the "Principal") as Principal, and Fidelity and Deposit Company of Maryland and American Bonding Company of Baltimore (therein sometimes called the "Surety") as Sureties, and is the Surety Bond referred to in the complaint herein as "The Surety Bond".

IT IS FURTHER STIPULATED, CONSENTED AND AGREED that said Building Loan Agreement (Exhibit A) and said Surety Bond (Exhibit B) may, on the presentation, argument and consideration by the 1562
Court of the motion brought on by plaintiff's notice of motion dated May 17, 1932 herein, be submitted and considered by the Court to the same extent and effect as though the same were duly offered and admitted in evidence on a trial herein, and to the same extent and effect as if the same had been set forth in the pleadings herein and for all purposes of said motion said copies shall be deemed to be the originals.

Dated, May 26, 1932.

ALFRED T. DAVISON,
Attorney for Plaintiff. 1563

THOS. E. WHITE,
Attorney for Defendants.

Stipulation Amending Notice of Motion.

1564

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE PRUDENCE COMPANY, INC.,
Plaintiff,

against

FIDELITY AND DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE,
Defendants.

1565

IT IS HEREBY STIPULATED, CONSENTED AND AGREED that the notice of motion herein, dated May 17, 1932, returnable May 24, 1932, wherein and whereby plaintiff has moved for an order striking out the First, Second, Third, Fifth, Seventh, Eighth, Ninth and Tenth Separate and Distinct Defenses contained in the answer of the defendants herein, on the ground that each such defense is insufficient in law, be and the same hereby is amended so as to include in such notice of motion notice of motion for an order striking out the Fourth De-
1566 fense contained in the answer of the defendants herein on the ground that such Fourth Defense is insufficient in law, so that and to the end that said notice of motion dated May 17, 1932, shall read as follows:

> "and also for an order striking out the First, Second, Third, Fourth, Fifth, Seventh, Eighth, Ninth and Tenth Separate and Dis-

Stipulation Amending Notice of Motion

tinct Defenses contained in the answer of the defendants herein, on the ground that each such defense is insufficient in law." 1567

Dated, New York, June 20, 1932.

ALFRED T. DAVISON,
Attorney for Plaintiff.

THOS. E. WHITE,
Attorney for Defendants.

Opinion of Judge Bondy, Dated January 18, 1933, on Motion to Strike Out Defenses from Answer. 1568

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.
(L 52-110)

THE PRUDENCE COMPANY, INC.,
Plaintiff,

against

FIDELITY AND DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE,
Defendants.

1569

ALFRED T. DAVISON, Esq. and ORRIN G. JUDD, Esq., for Plaintiff.

THOMAS E. WHITE, Esq. and JOSEPH F. MURRAY, Esq., for Defendants.

BONDY, District Judge:—

This is a motion to strike from the answer certain denials as sham and frivolous and nine defenses as insufficient in law.

1570 The action is upon a surety bond made by the defendants guaranteeing the completion of a building by the Central Park Properties, Inc., in accordance with the terms of a building loan agreement between it and the Prudence Company, Inc.; the obligee named in the bond.

For a first cause of action the complaint alleges that the plaintiff and Central Park Properties, Inc. executed a building loan agreement by which the plaintiff agreed to lend to Central Park Properties, Inc. $6,650,000. to be secured by a first mortgage on certain real estate and the building to be erected thereon; that the defendants exe-
1571 cuted and delivered to the plaintiff the bond in suit in the sum of $3,000,000. pursuant to the provisions of the building loan agreement, which was incorporated in the bond by reference, conditioned upon the completion of the building on or before December 16, 1930, in accordance with the terms of the building loan agreement. It alleges that the plaintiff advanced the full amount of the loan but that Central Park Properties, Inc. failed to complete the building on December 16, 1930, and abandoned the completion of the building on December 23, 1930; that the plaintiff in accordance
1572 with the provisions of the building loan agreement completed the building with damage to the plaintiff, including the loss of interest, cost of completion and taxes, amounting to $788,676.94.

For a second cause of action the complaint alleges the same facts and in addition thereto recites that in proceedings brought by the plaintiff to foreclose its mortgage, the premises were sold for less than the amount of the mortgage and expenses of foreclosure and that a deficiency judgment was rendered therein for $716,215.02; that

had the building been completed in accordance with the terms of the building loan agreement the value of the premises would have been so much in excess of $6,650,000. that the plaintiff upon the foreclosure of the mortgage would have realized the full amount of the principal and interest due it, over and above the expenses of foreclosure; that the deficiency judgment and other items of damage set forth amount to $950,706.68 for which sum and interest plaintiff demands judgment. 1573

It has been stipulated that the agreement and surety bond may "be submitted and considered by the court to the same extent and effect as though the same were duly offered and admitted in evidence on a trial herein, and to the same extent and effect as if the same had been set forth in the pleadings herein * * *." The provisions of the instruments so incorporated in the pleadings accordingly will control wherever inconsistent with any allegations contained therein. 1574

Since the denials against which the motion was directed simply raise questions as to the actual terms of the building loan agreement this stipulation and a further express agreement by the parties make it unnecessary to consider them.

The second defense is the most comprehensive and presents questions which are involved in several of the other defenses. It therefore is considered first. 1575

It is alleged that the building loan agreement provided that the plaintiff would make a first advance of $3,250,000. at the time of closing, that the remaining $3,250,000. ($3,400,000?) should be paid in instalments on the basis of 75% of the labor and materials installed in the building, and that the other 25% would be paid to Central Park

1576 Properties, Inc. as a final advance; that the building loan agreement further provided that no advance would be due and payable unless all work usually done at the stage of construction when the advance was applied for had been done in a good and workmanlike manner and all materials and fixtures usually installed at such stage of construction had been installed; that on December 5, 1930 the plaintiff had in its possession as and for the final advance only $300,000. instead of $812,500. and that on said date the plaintiff made the final advance of $300,000. to Central Park Properties, Inc. although to the knowledge of the
1577 plaintiff all work usually done at such stage had not been done in a good and workmanlike manner and all the materials and fixtures usually installed at such stage had not been installed.

The provisions of the agreement upon which the defendants rely are contained in paragraphs "Ninth" and "Nineteenth" thereof. Paragraph "Ninth" provides in part: "No advance shall be due unless all work usually done at the stage of construction when the advance is applied for be done in a good and workmanlike manner, and all materials and fixtures usually furnished and in-
1578 stalled at such stage of construction be furnished and installed. * * *"

Paragraph "Nineteenth", after reciting the first advance of $3,250,000., provides in part: "All subsequent advances shall be made by the Lender to the Borrower on the basis of seventy-five per cent. of the value of the labor and materials installed and incorporated in the construction of the building * * * as determined by the appraisers of the Lender."

The plaintiff contends that these provisions 1579
did not limit its discretion in making advances in view of the provisions of paragraph "Third", "Said loan is to be advanced in such amounts and at such times as Lender approves", and of paragraph "Ninth", "Advances may be made as and when the Lender or holder of the mortgage believes it advisable so to do, and all such advances or payments shall be deemed to have been made in pursuance of this agreement and not in modification thereof."

Defendants contend that these provisions cannot be reconciled and that the conflict should be resolved in their favor because the provision for 1580
the payments on a basis of seventy-five per cent. of the value of the work and material installed is typewritten and the others are printed, and because the plaintiff drew the agreement.

The defendants fail to take into account that they are compensated sureties, and insurers within the rule that ambiguities in insurance contracts must be construed in favor of the insured. See Pickens County v. National Surety Co., 13 Fed. (2d) 758, 762; Van Buren v. American Surety Co., 137 Iowa 490; Brandrup v. Empire State Surety Co., 111 Minn. 376.

1581

There is not any irreconcilable conflict between terms providing when an advance shall become due and payable and when the lender accordingly must make an advance, and terms providing that the lender may at his discretion make an advance although not otherwise due and payable. The fact that the provision for payment on a seventy-five per cent. basis is typewritten therefore does not

1582 nullify the provisions giving the lender discretion in making advances.

The provision making advances depends upon the stage of construction and the provision permitting advances to be made when the lender deems it advisable so to do are contained in the same paragraph. This in itself is convincing evidence that the parties considered them consistent. The fact that the former provision begins "No advance *shall be due*" and the latter "Advances *may be made*" establishes the nature of the reconciliation and clearly indicates a distinction between the plaintiff's obligation to make advances when due
1583 and payable under the express terms of the agreement and its privilege to do so prior thereto.

Defendant's contention that plaintiff was under an obligation to retain a certain percentage of the loan until final completion moreover is inconsistent with the provision of paragraph "Third" of the building loan agreement which states: "Interest on the full principal amount shall run from the date herein fixed for completion * * * unless the full amount shall be previously advanced. * * *" This indicates that the parties contemplated the possible advance of the full
1584 amount before completion.

Even assuming, however, that the provision that advances are to be made "on the basis of seventy-five per cent. of the value of labor and materials installed" limited plaintiff's discretion in making advances, the defense is insufficient in the absence of an allegation that advances were made beyond seventy-five per cent. of the value of labor and materials installed in the building.

An allegation that twenty-five per cent. of the amount of the loan was not retained is insufficient. The limitation of advances to seventy-five per cent. of the amount of the labor and materials is not the same as a limitation to seventy-five per cent. of the amount of the loan. British-American Tobacco Co., Ltd. v. U. S. Fidelity & Guaranty Co., 177 A. D. 582. 1585

Moreover, no defense is stated in the absence of an allegation that the defendants were actually prejudiced by premature advances. Globe Indemnity Co. v. Southern Pacific Co., 30 Fed. (2) 580; Pickens County v. National Surety Co., 13 Fed. (2) 758; Village of Canton v. Globe Indemnity Co., 201 A. D. 820; Colon & Co. v. Commercial Casualty Insurance Co., 226 A. D. 525, 528, affirmed 252 N. Y. 565. 1586

A surety is released only to the extent of its damage, and if this is less than the amount sued for, the defense must be designated as a partial defense. Houston v. Coombs, 224 A. D. 396; New York Civil Practice Act, Sec. 262.

The first defense alleges that the agreement provided that the building should be completed and ready for occupancy not later than December 16, 1930; that on December 5, 1930 the building was in a state of construction where it would have required a sum in excess of $170,000. to complete and make ready for occupancy, and that there were omissions of labor and materials from and substitutions of inferior materials in the building amounting in value to a sum in excess of $230,000.; that on the same day the plaintiff, with knowledge of these facts, made a full and final 1587

1588 payment of $300,000. to Central Park Properties, Inc. and thereby released and discharged the defendants from liability under the bond. It does not allege facts showing that on December 5, 1930 the building could in no event have been completed in accordance with the terms of the contract, and that the plaintiff, knowing that the principal on the bond must default, nevertheless made the final advance of $300,000. A defense alleging such facts would import a payment made in bad faith and might be valid. See Patterson v. Meyerhofer, 204 N. Y. 96, 100. The defense actually alleged however is insufficient.

1589 The third defense alleges that the agreement provided that the building should be completed and ready for occupancy not later than December 16, 1930; that on December 5, 1930 the plaintiff owed to the defendants the duty of reserving enough of the money then in its possession to assure the completion of the building; that on December 5, 1930 plaintiff paid Central Park Properties, Inc. $300,000., said sum being sufficient to complete the building and make it ready for occupancy. The chief reason for the insufficiency of this defense is the absence of any provision in the agreement imposing any duty of the kind al-
1590 leged, as has been pointed out. Moreover, the defense shows no violation even of the duty alleged, there being no allegation that the sum advanced was a final one, nor that the building could not be completed and made ready for occupancy by December 16, 1930.

The fourth defense alleges that the bond provided that plaintiff would deliver to defendants

written notice of any default of the principal within thirty days after two executive officers should have actual notice thereof; that on or about December 16, 1930 two executive officers of plaintiff had actual notice of the default but failed to give defendants notice as provided for by the bond. 1591

No damage or prejudice is alleged. Violation of conditions requiring notice of default to be given to compensated sureties does not discharge the surety unless it is damaged thereby, and even then only to the extent that it has been damaged, unless the provision requiring such notice is made a condition precedent to the surety's liability. Southern Surety Co. v. Mac Millan Co., 55 Fed. (2) 641; New Amsterdam Casualty Co. v. United States Shipping Board, 16 Fed. (2) 847; Barhydt v. Ellis, 45 N. Y. 107. 1592

The construction resulting in a condition is not favored. In any case, when the provision is expressly designated a covenant this construction will be adopted. National Surety Co. v. Long, 125 Fed. 887. The provision relied on by defendants is one of a group in the bond, all introduced by the words prominently printed in capital letters: "And the Principal and Surety Jointly and Severally Covenant and Agree with the Obligee as Follows." Use of the word "covenant" derives added significance from the fact that the bond by express language clearly indicates the distinction between the covenants and conditions therein. 1593

This defense is designated a complete one. Even if the defendants were damaged, the defense should be designated a partial one, unless the damage equalled the amount sued for.

1594 The fifth defense alleges that the bond provided that the plaintiff would retain from the total amount agreed to be advanced sufficient money with which the building might be completed in the event of the default of Central Park Properties, Inc., and the plaintiff agreed that in the event of any such default it would place at the disposal of the defendants such unadvanced amounts of money as would have been receivable by Central Park Properties, Inc., if the latter had not committed any default; that on December 16, 1930 when the default occurred there was no money in plaintiff's hands which was applicable to the com-
1595 pletion of said building.

Plaintiff's discretion was not thus limited, as has already been pointed out. The provision of the bond referred to gives defendants power, within twenty days after receipt of notice of the principal's default "to diligently proceed with or procure others to proceed with the construction and completion of said building. * * * And the Principal and Obligee agree that in the event the Surety exercises such right, then the Obligee shall * * * place at the disposal of the Surety for its use in the exercise of such right, unadvanced
1596 amounts of money which would have been receivable by the Principal from the Obligee under said building loan * * *" This is an agreement to place at defendants' disposal sums which have not been advanced, and not a promise as alleged that there will, at any given time, be unadvanced sums in plaintiff's possession. This is made even clearer in the sentence immediately following the one quoted from: "The amounts of money which

may be payable by the Obligee to the Surety in any contingency pursuant to the provisions of this paragraph are expressly limited to the amounts not theretofore advanced or applied by the Obligee under said building loan. * * *" 1597

The seventh defense alleges that the building loan agreement provided that the final advance would not be due and payable until Central Park Properties, Inc. had obtained and delivered to the plaintiff a certificate of completion issued by the Building Department of the City of New York but that the final advance was made without such certificate having been obtained and delivered to the plaintiff. 1598

The provision relied on appears in paragraph "Ninth" of the agreement and is as follows: "No advance shall be due unless all work usually done at the stage of construction when the advance is applied for be done in a good and workmanlike manner, and all material and fixtures usually furnished and installed at such stage of construction be furnished and installed, the final advance shall not be due and payable until the Borrower shall obtain and deliver to the Lender the usual certificate of completion issued by the Building Department. * * *"

Immediately following this we find "Advances may be made as and when the Lender or holder of the mortgage believes it advisable so to do, and all such advances or payments shall be deemed to have been made in pursuance of this agreement and not in modification thereof." 1599

As heretofore stated, the agreement provides for the time when and the conditions upon which

1600 advances should become due and payable and additionally gives the plaintiff the privilege to make advances though not due and payable under the agreement. The provision relied on does not limit the Lender's discretion in making advances.

The eighth defense alleges that the building loan agreement provided that all advances by plaintiff to Central Park Properties, Inc. would be made after application by the latter, which application should set forth the work incorporated to the date of the application, together with the cost of each item, but that this was not done.

This provision likewise is contained in the
1601 "Ninth" paragraph which gives the plaintiff the privilege to make advances though not otherwise due and payable.

The ninth defense, designated a partial one, alleges that on December 5, 1930, plaintiff and Central Park Properties, Inc. agreed that all the work required to complete the building could be done for $75,000.; that plaintiff made a final advance of $300,000. to Central Park Properties, Inc. and the latter deposited with the plaintiff $75,000.; that plaintiff should have applied this $75,000. to the completion of the building, but instead applied it
1602 on account of the principal or interest which became due on the mortgage.

In paragraph "Ninth" of the building loan agreement it is provided that "The Lender may apply any part of any advance in payment of interest or taxes due, and the amount so applied shall be deemed advanced to the Borrower."

The principal owed only one debt to the plaintiff. The defense alleges the application of the

money to this debt. No question of application of payments is involved. 1603

Even assuming the correctness of defendants' construction, the defense, not being confined to either of the causes of action, must be stricken out on motion, because in no case could it constitute a defense to the second cause of action. Price v. Derbyshire, 128 A. D. 472; Meyer v. Central Railroad of New Jersey, 185 A. D. 812; Browning, King & Co. v. Terwilliger, 144 A. D. 516; New York Civil Practice Act Sec 262.

The tenth defense, also designated a partial one, alleges that the omission of items and the substitutions of inferior materials referred to in the 1604 complaint (constituting damage in the sum of $228,722.78) were made with the knowledge and approval of the plaintiff and that plaintiff waived strict performance of the building loan agreement with reference thereto.

Plaintiff concedes that this defense would be sufficient were it not for the fact that "the allegations of the defense are capable of being supported by the knowledge or silent acquiescence on the part of the plaintiff."

The defense alleges plaintiff's knowledge and approval as a conclusion of fact, and accordingly 1605 is sufficient. We are not here concerned with the evidence which would be relevant to support it.

The motion accordingly is granted as to the first, second, third, fourth, fifth, seventh, eighth and ninth defenses, and denied as to the tenth.

January 18, 1933.

WM. BONDY,
U. S. District Judge.

Order, Dated February 17, 1933, Granting Motion to Strike Out Defenses From Answer.

1606.

IN THE UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE PRUDENCE COMPANY, INC.,
Plaintiff,

against

FIDELITY AND DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE,
Defendants.

1607

The plaintiff having moved by notice of motion dated May 17, 1932 as amended by stipulation signed by the attorneys for the parties hereto, dated June 20, 1932, for an order striking out as sham and frivolous, each and every denial contained in subdivisions marked "First", "Second", "Third" and "Fifth" of the answer of the defendants herein, and also for an order striking out the First, Second, Third, Fourth, Fifth, Seventh, Eighth, Ninth and Tenth separate and distinct defenses contained in the answer herein, on
1608 the ground that each such defense is insufficient in law;

Now, on the return of and on reading and filing said notice of motion dated May 17, 1932 and said stipulation amending the same, dated June 20, 1932, and on the complaint herein verified February 19, 1932 and the answer of the defendants, verified April 29, 1932, and on reading and filing the stipulation between the parties hereto, dated May 26, 1932, and upon the building loan agreement made September 24, 1929, between Central

Order Granting Motion to Strike Out Defenses from Answer

Park Properties, Inc. and The Prudence Company, Inc., and the surety bond dated September 25, 1929, executed by Central Park Properties, Inc., as principal, and Fidelity and Deposit Company of Maryland and American Bonding Company of Baltimore, as sureties, and after hearing Alfred T. Davison, Esq., on behalf of The Prudence Company, Inc., plaintiff, in support of the motion, and Joseph F. Murray, Esq., of counsel for the defendants in opposition thereto; and due deliberation having been had, and an opinion in writing having been rendered and filed dated January 18, 1933, it is 1609 1610

ORDERED that the motion to strike out the denials contained in subdivisions marked "First", "Second", "Third" and "Fifth" of the answer as sham and frivolous is denied upon the ground that it has been rendered a moot question by the above mentioned stipulation dated May 26, 1932; and it is further

ORDERED that the motion to strike out the First, Second, Third, Fourth, Fifth, Seventh, Eighth and Ninth separate and distinct defenses contained in the answer of the defendants herein on the ground that each such defense is insufficient in law, be and the same hereby is in all respects granted, and that said defenses be and the same hereby are struck out from the answer of the defendants; and it is further 1611

ORDERED that the Clerk of this Court be and he hereby is directed to make a note upon the margin of the original answer verified April 29, 1932, that such defenses are struck out by this order, and referring to this order; and it is further

Order Granting Motion to Strike Out Defenses from Answer

1612

ORDERED that the motion to strike out the Tenth separate and distinct defense contained in the answer of the defendants herein as insufficient in law, be and the same hereby is denied.

AND it is further ordered that the defendant may serve an amended answer within ten days after service of this order.

Dated, New York, February 17th, 1933.

WILLIAM BONDY,
United States District Judge.

1613

Notice of Motion to Strike Out Defenses from Amended Answer.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THE PRUDENCE COMPANY, INC.,
Plaintiff,

against

1614 FIDELITY AND DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE,
Defendants.

Sir:

PLEASE TAKE NOTICE, that on the complaint herein, verified February 18, 1932, and the amended answer of the defendants herein, verified March 2nd, 1933, and on the stipulation between the

1615

parties hereto, dated May 26, 1932, and upon the Building Loan Agreement, dated September 24, 1929, between Central Park Properties, Inc. and The Prudence Company, Inc., and the Surety Bond, dated September 25, 1929, executed by Central Park Properties, Inc., as principal, and Fidelity and Deposit Company of Maryland and American Bonding Company of Baltimore, as sureties, the plaintiff will move this Court at a Term thereof for the hearing of motions to be held at Room 235, United States Post Office Building, Borough of Manhattan, City, County and State of New York, on the 17th day of March, 1616
1933, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order striking out the "First", "Second", "Third", "Fourth", "Fifth" and "Sixth" separate and distinct defenses contained in the answer of the defendants herein on the ground that each such defense is insufficient in law and also for an order granting to the plaintiff such other and further relief as may be just and proper in the premises.

Dated, New York, N. Y., March 10, 1933.

ALFRED T. DAVISON,
Attorney for Plaintiff,
Office and Post Office Address,
2396 Third Avenue,
Borough of Manhattan,
New York City. 1617

To:

THOMAS E. WHITE, Esq.,
Attorney for Defendants,
55 Liberty Street,
Borough of Manhattan,
New York City.

Memorandum of Judge Bondy Endorsed on
1618 **Back of Notice of Motion Dated March 10, 1933, for Order Striking Out Certain Defenses.**

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

[L-52-110]

THE PRUDENCE COMPANY, INC.,
Plaintiff,

against

1619
FIDELITY AND DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE,
Defendants.

To meet insufficiencies in the allegations of the defenses contained in the original answer the defendants allege facts in the amended answer meeting the objections with reference to sufficiency of the first defense and overcoming some but not all of the objections to the other defenses. The
1620 motion as to the fourth defense having been withdrawn, the motion is granted as to the second, third, fifth and sixth defenses and denied as to the first (see opinion reported in 2 F. Supp. 454).

July 21, 1933.

WM. BONDY,
U. S. D. J.

Order, Dated July 28, 1933, Granting in Part and Denying in Part Motion to Strike Out Defenses from Amended Answer. 1621

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THE PRUDENCE COMPANY, INC.,
Plaintiff,

against

FIDELITY AND DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE,
Defendants. 1622

The plaintiff having moved, by notice of motion dated March 10, 1933, for an order striking out the First, Second, Third, Fourth, Fifth and Sixth Separate and Distinct Defenses, contained in the amended answer of the defendants herein on the ground that each such defense is insufficient in law;

Now, on the return of and on reading and filing said notice of motion dated March 10, 1933, and on the complaint herein, verified February 19, 1932, and the amended answer of the defendants, verified March 2, 1933; and on reading and filing the stipulation between the parties hereto dated May 26, 1932, and upon the Building Loan Agreement made September 24, 1929 between Central Park Properties, Inc. and The Prudence Company, Inc., and the Surety Bond dated September 25, 1929 executed by Central Park Properties, Inc., as Principal, and Fidelity and Deposit Company of Maryland and American Bonding Company of 1623

Order Granting in Part and Denying in Part Motion to Strike Out Defenses from Amended Answer

1624 Baltimore, as sureties, and upon the order made and entered herein February 17, 1933, and the opinion in writing, on which said last mentioned order was made and entered, said opinion being rendered and filed, and dated January 18, 1933; and after hearing Alfred T. Davison, Esq., on behalf of The Prudence Company, Inc., plaintiff, in support of said motion, and Joseph F. Murray, Esq., of counsel for the defendants, in opposition thereto; and the plaintiff having withdrawn its said motion with respect to the Fourth defense
1625 contained in said amended answer of the defendants; and due deliberation having been had, it is

ORDERED that the motion to strike out the First Separate and Distinct Defense contained in the amended answer of the defendants herein, on the ground that it is insufficient in law, be and the same hereby is denied; and it is further

ORDERED that the motion to strike out the Second, Third, Fifth and Sixth Separate and Distinct Defenses contained in the amended answer of the defendants herein, on the ground that each such
1626 defense is insufficient in law, be and the same hereby is in all respects granted and that said defenses be and the same hereby are struck out from the amended answer of the defendants; and it is further

ORDERED that the Clerk of this Court be and he hereby is directed to make a note upon the margin of the original amended answer verified March 2, 1933 that such defendants are struck out by this order and referring to this order; and it is further

Order Granting in Part and Denying in Part Motion to Strike Out Defenses from Amended Answer 1627

ORDERED that the motion to strike out the Fourth Separate and Distinct Defense contained in the amended answer of the defendants herein as insufficient in law, be and the same hereby is deemed to be withdrawn.

Dated, New York, July 28, 1933.

WILLIAM BONDY,
United States District Judge.

Petition for and Order Allowing Appeal and Supersedeas. 1628

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THE PRUDENCE COMPANY, INC.,
Plaintiff,

against

FIDELITY AND DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE,
Defendants. 1629

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The Fidelity and Deposit Company of Maryland and American Bonding Company of Baltimore, the above named defendants, feeling themselves aggrieved by a judgment made and entered

herein on June 14, 1934, adjudging that the plaintiff, The Prudence Company, Inc., recover of and from the said defendants the sum of $781,694.56, hereby pray that an appeal be allowed from said judgment to the United States Circuit Court of Appeals for the Second Circuit, for the reasons specified in the assignments of error filed herewith, and pray for an order allowing them to prosecute said appeal and to bring up for review upon such appeal the order dated February 17, 1933 and entered in the office of the Clerk of this court on February 17, 1933, granting plaintiff's motion to strike out the First, Second, Third, Fourth, Fifth, Seventh, Eighth and Ninth separate and distinct defenses contained in the answer of the defendants, and to bring up for review upon such appeal the order dated July 28, 1933, and entered in the office of the Clerk of this court on the 29th day of July, 1933, granting plaintiff's motion to strike out the Second, Third, Fifth and Sixth separate and distinct defenses contained in the amended answer of the defendants, and that a transcript of the record and papers and proceedings in said cause may be duly authenticated and transmitted to the United States Circuit Court of Appeals for the Second Circuit, and that a citation be issued as provided by law.

The defendants also pray that a supersedeas may be granted herein suspending the effect of said judgment until the final determination of said appeal by the United States Circuit Court of Appeals for the Second Circuit and the coming down of its mandate to the United States District Court for the Southern District of New York, that the amount of the appeal bond for superseding judg-

1633

ment be fixed at $828,847 and that the bond heretofore approved and filed on the 9th day of July, 1934, in the sum of $828,847 be accepted and approved as such bond.

Dated, New York, September 10, 1934.

THOMAS E. WHITE,
Attorney for Defendants,
99 John Street,
New York, N. Y.

1634

Upon the foregoing petition and upon all proceedings had heretofore herein, it is

ORDERED, that the appeal as above prayed for be and the same hereby is allowed; and

FURTHER ORDERED, that the amount of the appeal bond for superseding the judgment pending appeal is hereby fixed at $828,847 and that the bond heretofore approved and filed on the 9th day of July, 1934, in the sum of $828,847 be and the same hereby is approved as such bond, and execution upon the said judgment is hereby stayed until the final determination of said appeal by the United States Circuit Court of Appeals for the 1635
Second Circuit and the coming down of its mandate to the United States District Court for the Southern District of New York.

Dated, New York, September 10, 1934.

ALFRED C. COXE,
U. S. D. J.

Assignments of Error.

1636

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THE PRUDENCE COMPANY, INC.,
Plaintiff,

against

FIDELITY AND DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE,
Defendants.

1637 The above named defendants, Fidelity & Deposit Company of Maryland and American Bonding Company of Baltimore, by Thomas E. White, their attorney, assign error in the judgment and proceedings in the case as follows:

1. In that the Court struck out the first separate and distinct defence contained in the answer of the defendants.

2. In that the Court struck out the second separate and distinct defence contained in the answer of the defendants.

1638 3. In that the Court struck out the fourth separate and distinct defence contained in the answer of the defendants.

4. In that the Court struck out the fifth separate and distinct defence contained in the answer of the defendants.

5. In that the Court struck out the seventh separate and distinct defence contained in the answer of the defendants.

6. In that the Court struck out the eighth separate and distinct defence contained in the answer of the defendants. 1639

7. In that the Court struck out the ninth separate and distinct defence contained in the answer of the defendants.

8. In that the Court struck out the second separate and distinct defence contained in the amended answer of the defendants.

9. In that the Court struck out the third separate and distinct defence contained in the amended answer of the defendants.

1640

10. In that the Court struck out the fifth separate and distinct defence contained in the amended answer of the defendants.

11. In that the Court struck out the sixth separate and distinct defence contained in the amended answer of the defendants.

12. In that the Court denied defendants' motions to dimiss the complaint at the close of the case.

13. In that the Court directed a verdict in favor of the plaintiff for $777,934.54.

1641

14. In that the Court refused to direct a verdict in favor of the defendants.

15. In that the Court directed a verdict for $209,454.85 in favor of plaintiff on account of the items appearing in Exhibit No. 84.

16. In that the Court directed a verdict for $608 in favor of plaintiff for levelling cement floors.

1642 17. In that the Court directed a verdict for $875 in favor of plaintiff for window caulking.

18. In that the Court directed a verdict for $225 in favor of plaintiff for water proofing elevator pits.

19. In that the Court directed a verdict for $5,083.88 in favor of plaintiff for electric current.

20. In that the Court directed a verdict for $14,500.00 in favor of plaintiff for completing elevator installation.

21. In that the Court directed a verdict for
1643 $395.00 in favor of plaintiff for removing and reinstalling elevator pit equipment.

22. In that the Court directed a verdict for $406.01 in favor of plaintiff for unattached hardware left in the building when taken over.

23. In that the Court directed a verdict for $1,640.87 in favor of plaintiff for insurance premiums.

24. In that the Court directed a verdict for $72,882.00 in favor of plaintiff for painting.

25. In that the Court directed a verdict for
1644 $20,260.63 in favor of plaintiff for payroll.

26. In that the Court directed a verdict for $424.71 in favor of plaintiff for repairing compressor.

27. In that the Court directed a verdict for $13,647.42 in favor of plaintiff for steam consumption.

28. In that the Court directed a verdict for $6,500.00 in favor of plaintiff for supervision fee for completion.

29. In that the Court directed a verdict for 1645
$38,080.00 in favor of plaintiff for taxes for the first half of the year 1931.

30. In that the Court directed a verdict for $19,040.00 in favor of plaintiff for taxes for the second half of 1931, up to October 1, 1931.

31. In that the Court directed a verdict for $675.28 in favor of plaintiff for polishing terrazzo.

32. In that the Court directed a verdict for $143,542.28 in favor of plaintiff on account of the items appearing in Exhibit No. 85.

33. In that the Court directed a verdict for 1646
$2,175.00 in favor of plaintiff for the omission of bronze screens and glass for the same.

34. In that the Court directed a verdict for $4,408.00 in favor of plaintiff for cabinet work omitted.

35. In that the Court directed a verdict for $7,215.00 in favor of plaintiff for kellastone carpet strips omitted.

36. In that the Court directed a verdict for $5,137.00 in favor of plaintiff on account of wood stools and aprons omitted from metal windows. 1647

37. In that the Court directed a verdict for $800.00 in favor of plaintiff for wood flooring omitted in private dining rooms.

38. In that the Court directed a verdict for $2,037.76 in favor of plaintiff for omission of sanitary cove in cement base.

39. In that the Court directed a verdict for $3,557.00 in favor of plaintiff for closets omitted from servants' rooms.

1648 40. In that the Court directed a verdict for $300.00 in favor of plaintiff for charts omitted from panel boxes.

41. In that the Court directed a verdict for $250.00 in favor of plaintiff for unfinished electrical work in barber shop.

42. In that the Court directed a verdict for $4,069.44 in favor of plaintiff as the difference between the amount spent for medicine cabinets and the amount mentioned in the specifications as medicine cabinet expense.

1649 43. In that the Court directed a verdict for $19,150.00 in favor of plaintiff for the difference between the amount spent by plaintiff to complete painting and the amount which would have been required to comply with plans and specifications.

44. In that the Court directed a verdict for $100.00 in favor of plaintiff for sections for air filter and charging and cleaning tanks.

45. In that the Court directed a verdict for $713.00 in favor of plaintiff on account of plastering not done in the barber shop.

1650 46. In that the Court directed a verdict for $2,392.00 in favor of plaintiff on account of omission of Keene's cement wainscoating.

46A. In that the Court directed a verdict for $1,760.00 in favor of plaintiff on account of omission of plumbing items.

47. In that the Court directed a verdict for $500.00 in favor of plaintiff on account of payment to Fordham Cornice Works to furnish guarantee.

48. In that the Court directed a verdict for $2,840.00 in favor of plaintiff because of the fact that the speed of the express elevators was 600 feet per minute instead of 700 feet per minute. 1651

49. In that the Court directed a verdict for $200.00 in favor of plaintiff because iron kalamein doors were installed instead of copper doors.

50. In that the Court directed a verdict for $200.00 in favor of plaintiff because of omission of fireproofing.

51. In that the Court directed a verdict for $4,596.75 in favor of plaintiff because 681 bedroom mirrors were plain instead of beveled. 1652

52. In that the Court directed a verdict for $150.00 in favor of plaintiff for the omission of a door for book vault.

53. In that the Court directed a verdict for $26,900.00 in favor of plaintiff on account of the difference between the amount spent for lighting fixtures and the amount mentioned in the specifications for lighting fixture expense.

54. In that the Court directed a verdict for $22,600.00 in favor of plaintiff because of omission of fire places and mantel pieces. 1653

55. In that the Court directed a verdict for $1,870.35 in favor of plaintiff because terrazzo borders were installed on the lobby floor instead of marble borders.

56. In that the Court directed a verdict for $700.00 in favor of plaintiff for radiators omitted in stores.

1654 57. In that the Court directed a verdict for $375.00 in favor of plaintiff for the omission of valve charts and brass tags.

58. In that the Court directed a verdict for $25.00 in favor of plaintiff for one year's supply of gauge charts.

59. In that the Court directed a verdict for $200.00 in favor of plaintiff for thirteen terra cotta caps.

60. In that the Court directed a verdict for $12,416.00 in favor of plaintiff because of a
1655 change in plans to omit terra cotta.

61. In that the Court directed a verdict for $111.60 in favor of plaintiff because terrazzo on first floor was not polished.

62. In that the Court directed a verdict for $2,022.00 in favor of plaintiff because of omission of floor and wall tile in barber shop.

63. In that the Court directed a verdict for $1,030.00 in favor of plaintiff because soap dishes were installed in baths instead of combination soap, glass and tooth brush holders.

1656 64. In that the Court directed a verdict for $191.75 in favor of plaintiff because of omission of fixtures over lavatories in servants' rooms.

65. In that the Court directed a verdict for $8,849.63 in favor of plaintiff for fee of general contractor or architect to supervise completion of items listed in Exhibit No. 85.

66. In that the Court directed a verdict for $312,357.53 in favor of plaintiff as loss of interest

on the sum of $6,575,000.00 from December 16, 1930 to October 1, 1931. 1657

67. In that the Court sustained objection to the following question asked of the witness Grad:

> "Q. Many times the estimate in such a specification is put in a year or more before the particular articles are purchased; isn't that so?"

68. In that in the cross examination of the witness Grad regarding a conversation with the President of plaintiff, objection was sustained to the following question: 1658

> "Q. And didn't you tell him at that time about certain things which in your opinion were not in accordance with the plans and specifications?"

69. In that the Court over-ruled objection to the following question asked of the witness Lukach:

> "Q. Can you tell us what problems are involved in the completion of a building which differ in any way from those involved in straight construction work?" 1659

70. In that the Court sustained objection to the following question asked of the witness Lukach:

> "Q. Is there a place on this plan where these particular bronze screens could be put in?"

71. In that the Court sustained objection to the following question asked of the witness Lukach:

1660 "Q. Consider item 40 on schedule B, that is the racks and shelving—mail and key racks, file racks, etc. I will give this plaintiff's exhibit 85 to you (handing witness). In the rearrangement of the ground floor was provision made for the same spaces for clerks and information desk and telephone room, etc.?"

72. In that the Court sustained objection to the following question asked of the witness Lukach:

"Q. And many people use that instead of strips; isn't that so?"

1661 73. In that the Court over-ruled objection to the following question asked of the witness Lukach:

"Q. And how much did you have to pay them in order to have the equipment completed?"

74. In that the Court sustained objection to the following question asked of the witness Gladstone:

"Q. Now, do you know whether or not there is any custom in the City of New York regarding the reserving of the last or final coat
1662 of paint in apartments until some period later than the doing of the first coats of paint?"

75. In that the Court sustained objection to the following question asked of the witness Gladstone:

"Q. In your talks with Mr. Lukach, did he make any observation or complaint to you that the job which you had done was not a first quality job?"

76. In that the Court sustained objection to the following question asked of the witness Gladstone: 1663

"Q. Did he complain that the job which you had done was not in accordance with the specifications?"

77. In that the Court sustained objection to the following question asked of the witness Banfield:

"Q. In other words, if you had proceeded on the original plan the kitchen would not in your opinion have been a proper kitchen?" 1664

78. In that the Court sustained objection to the following question asked of the witness Banfield:

"Q. What, then, did you do as regards excavation?"

79. In that the Court sustained objection to the following question asked of the witness Banfield:

"Q. Were there, Mr. Banfield, instances where the material furnished and the equipment furnished and the work done on this 1665 building was in addition to or more valuable than the work and material which would have been necessary in order to complete the building according to the original plans and specifications?"

80. In that the Court sustained objection to the following question asked of the witness Banfield:

1666 "Q. What was the additional cost caused by the installation of copper radiators?"

81. In that in the examination of the witness Banfield regarding work done not provided by the plans and specifications where there were setbacks in the building, objection was sustained to the following question:

"Q. What was the additional cost involved in doing that work?"

82. In that in the examination of the witness Banfield regarding extra rock excavation beyond
1667 what was provided for by the plans and specifications, objection was sustained to the following question:

"Q. And what was the cost of that additional work?"

83. In that in the examination of the witness Banfield regarding improvements in the elevator system not provided for by the plans and specifications, objection was sustained to the following question:

"Q. And what was the additional cost of
1668 that?"

84. In that in the examination of the witness Banfield regarding the installation of a high tension system not provided by the plans and specifications, objection was sustained to the following question:

"Q. What was the value of that additional work?"

85. In that in the examination of the witness Banfield regarding the installation of certain

sound proofing not provided by the plans and specifications, objection was sustained to the following question: 1669

"Q. And what was the cost of that work?"

86. In that in the examination of the witness Banfield regarding the installation of 4 x 4 tile instead of 6 x 3 tile provided by the plans and specifications, objection was sustained to the following question:

"Q. And what was the value of that extra work?"

87. In that in the examination of the witness Banfield regarding the installation of cinder fill not provided by the plans and specifications, objection was sustained to the following question: 1670

"Q. What was the value of that additional work?"

88. In that in the examination of the witness Banfield regarding the installation of a steel tank instead of a wooden tank, objection was sustained to the following question:

"Q. What was the value of that extra work?" 1671

89. In that in the examination of the witness Banfield regarding an increase in the size of the incinerator beyond that provided by the plans and specifications, objection was sustained to the following question:

"Q. And what was the cost of that?"

90. In that in the examination of the witness Banfield regarding the installation of a system of

1672 indirect heating not provided by the plans and specifications, objection was sustained to the following question:

"Q. What was the value of that additional work?"

91. In that in the examination of the witness Banfield regarding an increase in the amount of the steel used in the building above what was provided by the plans and specifications, objection was sustained to the following question:

"Q. What was the additional cost—the ad-
1673 ditional value of that change?"

92. In that the Court sustained objection to the following question asked of the witness Banfield:

"Q. Now, assuming that there was about $100,000 worth of work to be done to make this building ready for occupancy, and that performing that $100,000 work the building would be complete, can you state whether or not the building, with these completed items in it was a building of a higher value than the building which would have been erected in
1674 strict accordance with the plans and specifications?"

93. In that the Court sustained objection to the following question asked of the witness Banfield:

"Q. And after having seen the building can you state whether or not the building as now constituted, leaving out of consideration any changes in the lobby floor or basement, is a building of greater value than the building

which would have been erected if the original plans and specifications had been complied with strictly?" 1675

94. In that the Court sustained objection to the following question asked of the witness Banfield:

"Q. I show you now defendant's Exhibit G for identification, and ask you whether the contractor for heating and ventilating approved the specification as the basis for the work to be done by him? (Handing witness)."

1676

95. In that in the examination of the witness Haas regarding his conversation with Bigelow at the time the contract between Central Park Properties and plaintiff was made, objection was sustained to the following question:

"Q. What talk did you have with him?"

96. In that the Court sustained objection to the following question asked of the witness Haas:

"Q. Then what, if anything, did he say to you regarding Mr. Walters?"

97. In that the Court sustained objection to 1677
the following question asked of the witness Haas:

"Q. Did Mr. Bigelow at that time tell you that Mr. Walters would have complete charge of the relations between the Central Park Properties and the Prudence Company?"

98. In that the Court sustained objection to the following question asked of the witness Haas:

"Q. Do you know how much it cost the Central Park Properties to erect this building, as far as it went?"

1678 99. In that the Court sustained objection to the following question asked of the witness Haas:

"Q. By erecting this building yourself or the Central Park Properties erecting this building itself instead of letting it to a general contractor, how much money or how much percentage was saved which a general contractor would receive?"

100. In that the Court sustained objection to the following question asked of the witness Lush:

"Q. And what was the total estimate to
1679 construct in accordance with those plans and specifications?"

101. In that the Court sustained objection to the following question asked of the witness Lush:

"Q. Assuming that after the Lefcourt organization withdrew from the work it was necessary to expend another $100,000 to complete the building, after the completion in that respect would you say whether or not the building after completed was as valuable or less valuable or more valuable than the building which would have been erected had the
1680 original plans and specifications been followed in every conceivable detail?"

102. In that the Court sustained objection to the following question asked of the witness Lush:

"Q. Taking into consideration that there have been certain alterations in the ground floor of that building, the ground and basement floor, and that there have been added to the serving pantries certain gas ranges, but leaving those items out of consideration,

is the building now as valuable as a building erected in strict accordance with these plans and specifications?'' 1681

103. In that the Court sustained objection to the following question asked of the witness Lush:

''Q. Would it have been a simple or difficult matter, Mr. Lush, to erect a building, a first class apartment hotel, on the premises in question, on the plans and specifications as originally drawn?''

104. In that the Court sustained objection to the following question asked of the witness Jacobs: 1682

''Q. Assume that you were requested to install in this building electric fixtures costing $50,000. Would you say whether or not those fixtures would be suitable to such a building or appropriate for such a building?''

105. In that the Court sustained objection to the following question asked of the witness Banfield:

''Q. And what manner did the Lefcourt organization contemplate using for the fixing of carpets on the floors?'' 1683

106. In that the Court held that there could be no waiver by the plaintiff of omissions and substitutions and changes in the plans and specifications except by a writing executed by an officer of the plaintiff.

107. In that the Court refused to allow testimony as to the value of the premises on December 16, 1930.

1684 108. In that the Court refused the request of the defendants to amend their answer to allege as a separate defense that the value of the premises on December 16, 1930 was in excess of the amount of the mortgage thereon.

WHEREFORE, the defendants pray that the judgment of the United States District Court for the Southern District of New York in favor of the plaintiff for $781,694.56 be reversed.

Dated, New York, September 10, 1934.

THOMAS E. WHITE,
1685 Attorney for Defendants,
99 John Street,
New York, N. Y.

Citation.

By the Honorable Alfred C. Coxe, one of the United States District Judges for the Southern District of New York, in the Second Circuit.

TO THE PRUDENCE COMPANY, INC.

GREETING:

1686 YOU ARE HEREBY CITED AND ADMONISHED to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, on the 9th day of October, 1934, pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the Southern District of New York, wherein Fidelity and Deposit Company of Maryland and American Bonding Company of Baltimore are appellants and you are ap-

pellees to show cause, if any there be, why the judgment in said appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf. 1687

Given under my Hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 10th day of September, in the year of our Lord, One thousand nine hundred and thirty-four, and of the Independence of the United States the One hundred and fifty-ninth.

ALFRED C. COXE,
United States District Judge for the Southern District of New York, in the Second Circuit. 1688

Notice of Appeal.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THE PRUDENCE COMPANY, INC.,
Plaintiff,

against 1689

FIDELITY AND DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE,
Defendants.

Sir:

PLEASE TAKE NOTICE, that the defendants above named hereby appeal to the United States Circuit Court of Appeals for the Second Circuit from the judgment in the sum of $781,694.56 in favor of the

1690 plaintiff and against the defendants entered herein in the office of the Clerk of this Court on the 14th day of June, 1934, and from each and every part of the judgment as well as from the whole thereof, and defendants intend to bring up for review on such an appeal the order dated February 17, 1933, and entered in the office of the Clerk of this Court on that day granting plaintiff's motion to strike out the first, second, third, fourth, fifth, seventh, eighth and ninth separate and distinct defenses contained in the answer of the defendants and the order dated July 28, 1933, and entered in the office of the Clerk of this Court
1691 on the 29th day of July, 1933, granting plaintiff's motion to strike out the second, third, fifth and sixth separate and distinct defenses contained in the amended answer of the defendants.

Dated September 10, 1934.

THOMAS E. WHITE,
Attorney for Defendants,
99 John Street,
New York, N. Y.

To: Clerk of U. S. District Court,
Southern District of N. Y.

1692 ALFRED T. DAVISON,
Attorney for Plaintiff,
2396 Third Ave., N. Y. C.

VOL. II

Vol. II

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 270

THE PRUDENCE COMPANY, INC., PETITIONER,

vs.

FIDELITY & DEPOSIT COMPANY OF MARYLAND AND AMERICAN BONDING COMPANY OF BALTIMORE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JULY 22, 1935.

CERTIORARI GRANTED OCTOBER 14, 1935.

Index to Exhibits.

PLAINTIFF'S EXHIBITS.

Exhibit No.		Admitted folio	Printed page
1	Building loan agreement, dated Sept. 24, 1929	198	567
2	Surety bond, dated Sept. 25, 1929	198	591
3	Eight cancelled checks totalling $3,250,000 covering first installment of loan (not printed)	200	-----
4	Specifications (printed in part)	201	619
5	Plans, approved June 14, 1929 (not printed)	202	-----
6	Amendments to Specifications, dated Sept. 24, 1929	203	673
7	Letter, dated Sept. 13, 1929, from Prudence Co. to Central Park Properties, Inc. (not printed)	204	-----
8	Letter from Lefcourt to Prudence Co., dated Sept. 13, 1929, and financial statement attached	205	676
9	Letter from Prudence Co. to Central Park Properties, dated Sept. 14, 1929 (not printed)	205	-----
10	Personal guarantee by Lefcourt, dated Sept. 25, 1929	206	678
11	Letter of Central Park Properties to Prudence Co., dated Jan. 2, 1930	207	683
12	Letter from Prudence Co. to Central Park Properties, dated Jan. 6, 1930	208	684

Exhibit No.		Admitted folio	Printed page
13	Letter of Prudence Co. to Central Park Properties, dated Jan. 7, 1930	209	685
14	Letter of Prudence Co. to Central Park Properties, dated Jan. 25, 1930	210	686
15	Letter from Central Park Properties to Prudence Co., dated Jan. 23, 1930	211	687
16	Letter from Central Park Properties to Prudence Co., dated Jan. 24, 1930	211	689
17	Letter from Central Park Properties to Prudence Co., dated Jan. 24, 1930	212	691
18	Letter from Prudence Co. to Central Park Properties, dated Jan. 28, 1930	212	692
19	Letter from Prudence Co. to Central Park Properties, dated Jan. 31, 1930	213	693
20	Letter of Prudence Co. to Central Park Properties, dated Feb. 4, 1930	214	694
21	Letter of Central Park Properties to Prudence Co., dated Feb. 3, 1930	214	695
22	Letter of A. E. Lefcourt to Prudence Co., dated Feb. 5, 1930	215	697
23	Letter from Prudence Co. to Central Park Properties dated Mar. 15, 1930	215	699

Exhibit No.		Admitted folio	Printed page
24	Letter from Prudence Co. to Central Park Properties, dated Mar. 24, 1930	216	700
25	Letter Central Park Properties to Prudence Co., dated April 7, 1930	216	701
26	Letter Prudence Co. to Central Park Properties, dated April 8, 1930	217	702
27	Letter Prudence Co. to Central Park Properties, dated April 10, 1930	218	703
28	Letter Prudence Co. to Central Park Properties, dated April 10, 1930	218	704
29	Letter Prudence Co. to Central Park Properties, dated April 10, 1930	219	705
30	Letter Prudence Co. to Central Park Properties, dated April 15, 1930	219	706
31	Letter Prudence Co. to Central Park Properties, dated April 15, 1930	220	707
32	Letter Prudence Co. to Central Park Properties, dated April 21, 1930	221	708
33	Requisition sheet of Central Park Properties, Inc., requesting advance on loan, dated Mar. 4, 1930	224	709
34	Two Checks of Prudence Co. to order of Central Park Properties, dated Mar. 7, 1930, for $86,691.67 and $288,308.33 (not printed)	231	----

Exhibit No.		Admitted folio	Printed page
35	Ten Requisition Sheets, dated from Mar. 21, 1930 to Sept. 22, 1930 (not printed)	232	-----
36	Twenty Checks in payment of requisitions (not printed)	234	-----
37	Requisition for final payment, dated October 6, 1930	237	710
38	Three additional documents requesting final payment on loan	239	711
39	Certificate of Occupancy	240	712
40	Letter of Central Park Properties to Prudence Co., dated Nov. 1, 1930	241	718
41	Letter of Fidelity & Deposit Co. of Maryland to Prudence Co., dated Nov. 17, 1930	243	719
42	Letter of American Bonding Co. to Prudence Co., dated Nov. 21, 1930	243	720
43	Letter from Prudence Co. to American Bonding Co., dated Nov. 24, 1930	244	721
44	Ten Checks constituting final advance on loan (not printed)	249	-----
45 for Identification	Report of R. E. Billsborrow, dated Nov. 10, 1930 (Defts.' Ex. B)	251	805
46 for Identification	Report of R. E. Billsborrow, dated Nov. 28, 1930 (Defts.' Ex. B)	252	809
47 for Identification	Estimate of Mr. Billsborrow, dated Nov. 28, 1930 (Defts.' Ex. B)	253	813

Exhibit No.		Admitted folio	Printed page
48 for Identification	Report of Mr. Billsborrow, dated Dec. 16, 1930 (Defts.' Ex. B)	253	814
49 for Identification	List of Mr. Billsborrow, dated Dec. 16, 1930 (Defts.' Ex. B)	254	817
50 for Identification	Inspection Report Summary (Defts.' Ex. B)	255	818
51	Letter Prudence Co. to Central Park Properties, dated Dec. 17, 1930	256	722
52	Certificate from Central Park Properties, dated Dec. 5, 1930	256	723
53	Report of New York Appraisal Department, signed by Peter A. Welles, dated Dec. 29, 1930	257	724
54	Another report as above dated Jan. 5, 1931	258	725
55	Letter from G. S. Braislin to Charles C. Peters, dated Jan. 6, 1931	259	725
56	Letter of Fidelity & Deposit Co. of Maryland to Prudence Co., dated Jan. 7, 1931	260	726
57	Letter from G. S. Braislin to Fidelity & Deposit Co. of Maryland, et al., dated Jan. 13, 1931	261	727
58	Letter of Fidelity & Deposit Co. of Maryland to Prudence Co., dated Jan. 16, 1931	262	728

Exhibit No.		Admitted folio	Printed page
59	Letter of American Bonding Co. of Baltimore to Prudence Co., dated Jan. 16, 1931	263	729
60	Letter of G. S. Braislin to Fidelity & Deposit Co. of Maryland, to American Bonding Co. of Baltimore, to Central Park Properties, dated Feb. 14, 1931	264	730
61	Letter of American Bonding Co. to G. S. Braislin, dated Feb. 16, 1931	264	731
62	Letter of G. S. Braislin to Fidelity & Deposit Co. of Maryland, to American Bonding Co. of Baltimore, to Central Park Properties, dated Feb. 25, 1931	265	732
63 for Identification	Report of Mr. Billsborrow, dated Feb. 14, 1931 (Defts.' Ex. B)	268	819
64 for Identification	Report of Mr. Billsborrow, dated Feb. 20, 1931 (Defts.' Ex. B)	269	823
65 for Identification	Report of Mr. Billsborrow, dated Feb. 24, 1931 (Defts.' Ex. B)	270	829
66	Letter of G. S. Braislin to Fidelity & Deposit Co. of Maryland and American Bonding Co. of Baltimore, dated March 31, 1931	271	739
67	Letter of G. S. Braislin to Fidelity & Deposit Co. of		

Exhibit No.		Admitted folio	Printed page
	Maryland, to American Bonding Co., to Central Park Properties, dated April 11, 1931	272	741
68	Letter of Fidelity & Deposit Co. to Prudence Co., dated June 10, 1931	272	743
69	Letter of American Bonding Co. to Prudence Co., dated June 10, 1931 (not printed)	273	-----
70	Letter of G. S. Braislin of Prudence Co. to Fidelity & Deposit Co. of Maryland, to American Bonding Co. of Baltimore, to Central Park Properties, dated June 24, 1931	274	744
71	Letter of Prudence Co. to Fidelity & Deposit Co. of Maryland, to American Bonding Co. of Baltimore, to Central Park Properties, dated June 9, 1931	275	745
72	Letter of Prudence Co. to Fidelity & Deposit Co. of Maryland, to American Bonding Co. of Baltimore, to Central Park Properties, dated June 30, 1931	276	752
73	Letter of Fidelity & Deposit Co. of Maryland to Prudence Co., dated July 8, 1931	277	755
74	Letter of American Bonding Co. to Prudence Co., dated July 8, 1931 (not printed)	278	-----

Exhibit No.		Admitted folio	Printed page
75	Letter of American Bonding Co. to Prudence Co., dated Sept. 3, 1931	278	756
76	Receipt of Prudence Co. for $75,000, dated Dec. 5, 1930, signed by Alexander Johnston	279	757
77	Eight checks in payment of steam bills (not printed)	293	-----
78	5 Checks in payment of electric current (not printed)	295	-----
79	Receipted Bill of Marks Bros., dated Jan. 10, 1931, for replacement of broken glass (not printed)	296	-----
80	Check to Holmes Protective Co. for watchman (not printed)	307	-----
81	3 Checks to Remsen Brokerage Co. for fire insurance (not printed)	332	-----
82	2 Checks to City Collector for taxes (not printed)	334	-----
83	Check for $1560 for telephone (not printed)	335	-----
84	Schedule A (revised)	539	758
85	Schedule B (revised)	539	763
86	Letter dated May 21, 1929, from Mr. Haas addressed to Frank Grad	477	766

Exhibit No.		Admitted folio	Printed page
87	Letter dated Oct. 4, 1929, from Central Park Properties to Frank Grad	478	767
88	Letter dated April 7, 1930, from Central Park Properties to Frank Grad	480	768
89	Report of Frank Grad, dated July 6, 1931, re Essex House	558	769
90	Letter dated April 9, 1930, from Central Park Properties to Frank Grad	489	779
91 for Identification	Memorandum of Mr. Lush, March 6, 1930 (not printed)	492	----
92	Letter dated Mar. 17, 1930, from Central Park Properties to Frank Grad	492	780
93	Plan of second floor (not printed)	497	----
94	Letter of Dec. 7, 1929, from Central Park Properties to Grad	540	781
95 for Identification	Copy of memorandum of C. W. Lush, dated April 29, 1930 (not printed)	543	----
96 for Identification	Copy of memorandum of C. W. Lush, dated Mar. 5, 1930 (not printed)	547	----
97	Letter, Central Park Properties to Otis Elevator Co., dated Dec. 18, 1929	550	782

Exhibit No.		Admitted folio	Printed page
98 99 100 101 102	Mechanical Specifications (not printed)	645	-----
103	Letter of Central Park Properties to Frank Grad, dated Nov. 15, 1929	656	783
104	Photograph of the Building	660	785
105 for Identification	Note books and loose sheets of Mr. Lukach (not printed)	677	-----
106	Letter, dated May 27, 1931, from 58-59 Realty Corp., signed by Lukach, to Keeler, Inc.	686	786
107	Letter, dated April 11, 1931, from Mr. Gladstone to Mr. Lukach	984	788
108	Letter dated Oct. 16, 1929, of Central Park Properties to Frank Grad	1169	789
109	Contract, dated April 22, 1931, between 58-59 Realty Corp. and Otis Elevator Co. (printed in part)	1442	790

DEFENDANTS' EXHIBITS.

	Admitted folio	Printed page
A—Loan Acceptance by Prudence Co.	341	792
B—Plaintiff's Exhibits for Idenfication 45, 46, 47, 48, 49, 50 and 63, 64 and 65 (reports and estimates of Billsborrow)	429	805
C—Letter, dated Nov. 6, 1930, from Prudence Co. to Central Park Properties	460	836
D—Letter, dated Nov. 7, 1930, from Central Park Properties to Prudence Co.	460	837
E—Letter, dated Nov. 13, 1930, from Central Park Properties to Mr. Mark	461	838
F—Letter, dated April 10, 1930, from Central Park Properties to Prudence Co.	462	839
G—Specifications for heating and ventilating enclosed in foregoing letter, Exhibit F (not printed)	1079	-----
H—Plan of alterations of Mr. Lukach (not printed)	737	-----
I—Painting Contract between 58-59 Realty Corp. and Landsmann Bros. & Soffin (printed in part)	801	840
J—Contract, Central Park Properties with Globe Painting & Decorating Co., for painting		

	Admitted folio	Printed page
and decorating (printed in part)	946	847
K—Estimate submitted to Mr. Lukach, dated April 8, 1931, for painting work	960	851
L—Letter, dated January 19, 1930, from Prudence Co. to Central Park Properties	1140	852
M—Letter, dated January 21, 1930, from Frank Grad to Mr. Haas	1142	853
N—Letter, from Prudence Co.	1142	854
O—Seven Letters, collectively offered at one time at Court's suggestion	1143	855
P—Contract, between Darmstadt and Central Park Properties for plumbing (not printed)	1188	----
Q—Agreement, between Alef Corp. and Otis Elevator Co. (printed in part)	1290	863
R—Schedules of Landsman, regarding costs of papering and painting (not printed)	1396	----

Proceedings in U. S. C. C. A., Second Circuit 877
Opinion, Manton, J. 877
Decree 885
Clerk's certificate 885
Order allowing certiorari 887

Stipulation and Order Regarding Exhibits. 1693

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

[L-52-110]

THE PRUDENCE COMPANY, INC.,
Plaintiff-Respondent,

against

FIDELITY AND DEPOSIT COMPANY OF MARYLAND and 1694
AMERICAN BONDING COMPANY OF BALTIMORE,
Defendants-Appellants.

On the annexed consent of the parties hereto, it is

ORDERED, that Plaintiff's Exhibits 3, 5, 7, 9, 34, 35, 36, 44, 69, 74, 77, 78, 79, 80, 81, 82, 83, 91, 93, 95, 96, 98, 99, 100, 101, 102 and 105 and Defendants' Exhibits G, H, P and R, need not be printed in the record herein and that Plaintiff's Exhibits 4 and 109 and Defendants' Exhibits I, J and Q be printed only in part, but that the said exhibits omitted in whole or in part may be referred to on 1695

1696 the argument and shall be deemed as part of the record as if the same had been printed herein.

Dated New York, December 5, 1934.

MANTON,
U. S. C. J.

Entry of the above order is hereby consented to.

Dated New York, December 4, 1934.

ALFRED T. DAVISON,
1697 Attorney for Plaintiff-Respondent.

THOMAS E. WHITE,
Attorney for Defendants-Appellants.

Filed Dec. 5, 1934,
U. S. C. C. A.

1698

Plaintiff's Exhibit 1.

1699

(Building Loan Agreement.)

B. L. Agt. Prudence No. 233 (3/15/27)

AGREEMENT, made this 24th day of September, 1929, between CENTRAL PARK PROPERTIES, INC., a New York corporation, having its principal place of business at No. 1359 Broadway, Borough of Manhattan, City, County and State of New York, hereinafter referred to as the Borrower, and THE PRUDENCE COMPANY, INC., a corporation organized under the laws of the State of New York, having its principal place of business at No. 331 Madison Avenue, in the Borough of Manhattan, City and 1700
State of New York, hereinafter referred to as the Lender.

WITNESSETH:

WHEREAS, the Borrower has made and hereby makes application to the Lender for a loan in the principal amount hereinafter set forth to aid the Borrower in discharging existing mortgages (if any) upon the land hereinafter described, the payment of fees and disbursements hereinafter provided for, and in the erection of the building or buildings hereinafter described, and/or to pay part of the purchase price of said land. 1701

NOW, THEREFORE, in consideration of the mutual agreements herein contained, the parties hereto agree with each other as follows:

FIRST: The Lender hereby accepts the said application upon the terms herein set forth, and provided the Borrower complies with all of the covenants, terms and conditions of this agreement, and of the bond and mortgage herein referred to, the Lender agrees to advance to the Borrower,

the principal sum of—SIX MILLION SIX HUNDRED FIFTY THOUSAND ($6,650,000.)—DOLLARS, as hereinafter set forth, and the Borrower agrees to take said loan and the advances on account thereof as and when such advances are payable, and to perform and comply with all and every of the covenants, terms and conditions herein and in said bond and mortgage contained, the obligation of the Lender to make advances being conditioned upon the compliance by the Borrower with all of said covenants, terms and conditions.

SECOND: Said loan shall be evidenced and secured by the bond of the Borrower and a mortgage, duly executed and acknowledged by all parties necessary to make such mortgage a valid first lien upon the premises described in Schedule "A" hereto annexed and appurtenances thereof, and the building or buildings and the other improvements erected and to be erected on said premises, and the equipment ~~and personal property~~ contained and to be contained therein, free and clear of all liens and encumbrances; said mortgage lien to be of such quality as the title insurance company to whom application shall be made for a policy of title insurance, will approve and insure as a valid first lien, free from all encumbrances and objections to title except such as may be waived by the Lender. Said bond and mortgage shall be on forms approved by the Lender's counsel, and shall contain such provisions as said counsel may require. ~~At the option of the Lender, the Borrower will execute on the closing, two bonds and mortgages in amounts designated by the Lender and totalling the principal amount of this loan, such mortgages to contain suitable pro-~~

~~visions for consolidation thereof upon completion of the building to be erected on said premises; if two or more bonds and mortgages are given as herein provided or are held by or assigned to the Lender as herein provided, any reference in this agreement to a "bond and mortgage" shall be deemed to include all such bonds and mortgages.~~ 1705
The Lender may take existing mortgages on the premises described in Schedule "A" by assignment at the closing of this loan ~~or upon any advance thereunder~~ and upon request by the Lender the Borrower shall arrange with any mortgagees for such assignment or assignments, and at Lender's option such mortgages shall be spread, con- 1706
solidated, modified and extended on forms approved by the Lender's counsel in conjunction with a new mortgage for the balance of principal in such manner as to create a valid first lien in the amount of this loan on a good and marketable title to the said premises of the quality hereinabove prescribed. Borrower represents that the mortgage tax of one-half of one per centum has been paid upon all mortgages now liens on the premises. The Borrower agrees to execute and/or obtain consents of stockholders, corporate certificates and any other instrument or instruments 1707
deemed necessary by the Lender or its counsel to make said bond and mortgage a valid first lien as aforesaid; all such instruments to be in form and substance satisfactory to the Lender's counsel.

THIRD: Said bond shall be conditioned for the repayment of the amounts advanced thereon on the 16th day of December, 1930; together with interest at the rate of six (6%) per centum per annum due and payable on the 16th day of Decem-

1708 ber, 1930, and quarter-annually thereafter and as hereinafter provided.

Said loan is to be advanced in such amounts and at such times as Lender approves. Accrued interest on all amounts advanced shall be due and payable at the time of each subsequent advance until the loan has been fully advanced. Interest on the full principal amount shall run from the date herein fixed for completion (whether or not the building be completed on said day), unless the full amount shall be previously advanced, in which case interest on the full amount of principal shall run from the date of the final advance. The pro-
1709 visions of this paragraph shall not relieve the Borrower from the obligation to pay interest on the quarter annual dates. ~~Both principal and interest shall be payable without deduction for any Federal or State taxes, assessments or charges, and the Borrower shall pay to the Lender semi-annually the sum of four per centum of the semi-annual interest due on said bond in lieu of normal Federal income tax (whether or not the Lender shall be obligated to pay any such tax and irrespective of the amount thereof).~~

Said bond and mortgage shall contain provi-
1710 sions accelerating the maturity of the principal and interest thereby secured.

~~Fourth: Until the amount secured by said bond and mortgage is fully paid, the owner of the mortgaged premises shall deposit in advance with the Lender whether or not it shall then be the holder of said bond and mortgage, on the first day of each month, _____, beginning _____ _____ 19___, and _____ thereafter, the equal proportionate part of the principal and interest falling due on said bond on the next suc-~~

ceeding interest date and the equal proportionate part of the taxes which will fall due nearest such interest date (whether before or after), such proportionate parts of principal, interest and taxes to be fully deposited on or before the first day of the month preceding the dates upon which the same respectively from time to time become due. Said deposits shall be held by the Lender without interest to the depositor and applied as follows: So much of said deposits as may be required to pay the taxes shall be reserved, and used to pay the same and the balance shall be applied on interest dates for the other purposes for which deposited. If the taxes payable for the current calendar year have not been fixed at any time specified for the deposit thereof, then the amount of such deposit shall be computed upon the basis of the taxes assessed for the immediately preceding year. 1711 1712

FIFTH: The payment of principal and interest on said bond and mortgage, as and when the same shall become due, and all other payments required to be made hereunder, and the performance by the Borrower of all the covenants and agreements herein contained, shall be guaranteed jointly and severally by ABRAHAM E. LEFCOURT; and such guarantee shall become null and void when the Municipal and State Departments having jurisdiction of the building described herein have issued the customary certificates of occupancy, and the Borrower agrees to obtain and deliver such guarantee in form satisfactory to the Lender's counsel. 1713

SIXTH: The maturity of the principal sum secured by said bond and mortgage or so much

thereof as has been advanced shall be accelerated at the option of the Lender, and said principal sum shall become and be due and payable at the option of the Lender, upon the happening of any of the events specified in paragraph "Eighth" hereof, and if the Lender shall exercise such option, it shall give notice to the Borrower in the manner herein provided, fixing the date upon which the principal sum secured by said bond and mortgage shall become and be due and payable, and if such notice be given, said principal sum and accrued interest shall become and be due and payable on the day fixed in said notice in the same manner and with the same force and effect as though the day fixed in said notice were the day specified in said bond and mortgage for the maturity thereof.

SEVENTH: The Lender or any holder of said bond and mortgage may extend the time of payment of the principal secured by said bond and mortgage and any extension so granted shall be deemed made in pursuance of this agreement and not to be a modification thereof. The amortization provisions (if any), interest rate and times when the principal and interest thereunder shall be due and payable may be modified or changed by consent of the Lender and Borrower, and such modifications or changes may be incorporated in the bond and mortgage or in a supplemental agreement without the execution and filing of an amended or supplemental building loan agreement.

EIGHTH: In either of the following events, prior to the final advance, the Lender's obligation to make further advances shall cease, and the princi-

pal sum secured by said bond and mortgage, or so much thereof as shall have been advanced, and the interest thereon, shall at the option of the Lender become and be due and payable: 1717

1. If any mechanics lien or liens be filed against said premises and remain undischarged for / ~~ten~~ twenty days.

2. If the Lender shall not approve of the payment called for because of some act, encumbrance or question arising after the making of the preceding payment.

1718

3. If the Borrower assigns this contract or said advances or any interest therein, or if said premises be conveyed or encumbered in any way, unless the Lender consent thereto in writing.

4. If the improvements on said premises, or any building which may be erected or in process of erection upon said premises shall materially encroach upon the street or upon adjoining property or violate any covenants or restrictions against the premises.

5. If the improvements on said premises be materially injured or destroyed by fire or otherwise. 1719

6. If the makers of said bond and mortgage and/or any extension agreement shall fail to comply with any of the covenants therein contained.

7. If any materials, fixtures or articles used in the construction or equipment of the building or appurtenant thereto be not purchased by the owner of the land so that the ownership thereof will vest in said owner free from encumbrance, on delivery at the premises.

1720 8. If the Borrower does not erect said building strictly in accordance with plans and specifications, approved in writing by the Lender and conforming with all laws and municipal regulations, orders and requirements.

9. If the Borrower shall fail or refuse to cause the construction of said building, to proceed with all due diligence, or if said building be not completed and ready for occupancy on or before the date herein fixed for completion.

10. If the materials or construction of the building be not satisfactory to the Lender.

1721 11. If a petition in bankruptcy be filed by or against the Borrower.

12. If default be made in the payment of interest upon any of the mortgages herein mentioned.

13. If any note or notices of violation of law or of any Municipal regulation or ordinance be filed against the premises or be issued by any public department or authority against the building or against the premises or against the Borrower, by reason of any matter in or about the
1722 construction of the building, and remain uncomplied with for a period of five days.

14. If the owners of said premises do not permit a representative of the Lender to enter upon said premises and inspect the building thereon at all reasonable times during construction.

15. If the Borrower fails to comply with any of the provisions of this agreement, or, after twenty days' notice and demand, with any other

reasonable requirement of the Lender not specifically incorporated in the instruments covering this loan. 1723

The provisions of paragraph "Eighth" are in addition to, and not in any manner in limitation of, the provisions of said bond and mortgage.

NINTH: No advance shall be due unless all work usually done at the stage of construction when the advance is applied for be done in a good and workmanlike manner, and all material and fixtures usually furnished and installed at such stage of construction be furnished and installed, the final advance shall not be due and payable 1724 until the Borrower shall obtain and deliver to the Lender the usual certificate of completion issued by the Building Department, and in case the building be one to which the provisions of the Tenement House Law apply, until the Borrower shall produce and deliver to the Lender the usual certificate issued by the Tenement House Department that said building conforms in all respects to the requirements of the Tenement House Law. Advances may be made as and when the Lender or holder of the mortgage believes it advisable so to do, and all such advances or payments shall be 1725 deemed to have been made in pursuance of this agreement and not in modification thereof. The making of any advance or any part of an advance shall not be deemed an approval or acceptance by the Lender or the holder of the mortgage of the work theretofore done. The Lender may make any advance or part of any advance after the happening of any of the events specified in paragraph "Eighth" of this agreement without thereby waiving the right to demand payment of the mort-

1726 gage debt and without becoming liable to make any other or further advance. The Lender may apply any part of any advance in payment of interest or taxes due, and the amounts so applied shall be deemed advanced to the Borrower. The Lender may at any time release portions of the mortgaged premises, upon receiving what, in the opinion of the Lender, is a proper payment on account of the mortgage debt.

The Borrower covenants on demand of Lender to exhibit to Lender at any time and from time to time the original contract or contracts (in their entirety) for or relating to heating and refrigerat-
1727 ing equipment, plumbing fixtures, ranges, kitchen cabinets, gas and electric fixtures, vacuum cleaning system, sprinkling system or other items or fixtures installed or to be installed in the said building or entering into the equipment or construction thereof, and on demand the Borrower agrees to furnish to Lender duplicate copies of any such contract or contracts.

All advances are to be made at the office of THE PRUDENCE COMPANY, INC., 162 Remsen Street, Brooklyn, N. Y., and the Borrower shall give to the Lender three days' notice in writing before
1728 demanding any advance. Applications for advances shall set forth in detail the work incorporated in the building to date of applications, together with the cost of each item. On each succeeding advance, if lender requests, receipted vouchers showing application of funds from the preceding advance on account of the construction of the building shall be presented. Advances when approved shall be made within five days after receipt of application.

TENTH: The Borrower agrees to erect upon the 1729
premises described in Schedule "A", the building more particularly described in Schedule "B" hereto attached and install the equipment therein referred to. Said building shall be erected according to the plans and specifications submitted to and approved in writing by the Lender and shall contain at least 7,000,000 cubic feet. The cubic contents of said building shall be computed from a point four inches below the top of the finished cellar floor to the average height of the top of the roof beams. The Borrower agrees that prior to the time when the Lender shall be required to make any advance under this agreement, 1730
the Borrower will cause said plans to be filed with the Municipal Departments having jurisdiction, and will obtain the approval of such departments to such plans; and the Borrower further agrees that the Lender shall not be required to make advances hereunder if said plans are amended or changed, unless such amendment or change be approved by the Municipal Departments having jurisdiction, and by the Lender. Lender shall have the privilege of placing and keeping neat advertising signs on said building during the course of construction, but borrower shall move 1731
and replace said signs on the building as becomes necessary during construction.

The borrower agrees to cause the work of construction and equipment of said building to proceed in a good and workmanlike manner and to cause said building to be completed and ready for occupancy not later than December 16th, 1930, (said day being the date herein fixed for completion), delays by strikes and lockouts excepted.;

1732 said construction work shall commence on or before September 23rd, 1929.

ELEVENTH: The Borrower shall furnish to the
$3,000,000.
Lender a surety bond in the amount of ~~this loan,~~ in a company satisfactory to Lender, to be in form and contents satisfactory to Lender, conditioned upon and guaranteeing completion of said building within the time hereinafter specified in strict accordance with said plans and specifications and this agreement and free from claims or liens.

TWELFTH: Upon the happening of any or either
1733 of the events specified in this paragraph prior to the final advance, the Borrower expressly authorizes and empowers the Lender, at the option of the Lender, to enter upon the demised premises and take possession of all building material, equipment and similar items whether the same be in the premises or on the street in front of or adjacent thereto and thenceforth, at the option of the Lender proceed with the construction of the building and completion thereof, and in connection therewith, to use any material, equipment or similar items in or near the premises and to expend
1734 such sums of money and to make such contracts in the name of the Borrower with respect to the erection and completion of said building, as the Lender may deem proper or necessary to accomplish the completion of the building, or at the option of the Lender, the Lender may advance for the account of the Borrower, moneys sufficient to discharge, correct or remedy any of the items below specified, it being understood and agreed that the Lender shall be under no obligation so to do. The events and items referred to are as follows:

(a) If any mechanic's lien or liens be filed against the premises and remain undischarged for twenty / ~~ten~~ days. 1735

(b) If the building be unprotected or unguarded, or be vacant or deserted.

(c) If any action be brought to foreclose the mortgage or mortgages herein provided for, or either of them.

(d) If the construction of the building is not carried on with reasonable dispatch or if such construction be discontinued at any time, or if such construction be carried on in such manner that the architect or engineer of the Lender shall certify in writing that proper progress is not being made in the construction of the building. 1736

Any sums paid or expended in accordance with the provisions of this paragraph shall be deemed advanced to the Borrower and shall be secured by said bond and the mortgage accompanying the same, and at the option of the holder of said bond and mortgage may be deducted from any balance of principal not theretofore advanced, and if the amounts so expended plus amounts theretofore advanced and accrued interest, shall at any time exceed the principal sum of said bond and mortgage, any such excess shall be deemed added to the principal sum secured by said bond and mortgage and be secured thereby, together with interest at the rate of six per centum per annum, and at the time of the advance by the Lender of each and every sum in excess of the original principal amount of said bond and mortgage, the Lender is authorized to make, execute, acknowl- 1737

edge and deliver a certificate as to the excess amount so advanced, and on behalf of the Borrower to execute, acknowledge and deliver such certificate as the attorney in fact of the Borrower hereby appointed for that purpose, and said certificate, as and when executed and delivered, shall have the force and effect of increasing the lien of the bond and mortgage herein provided for, to the extent set forth in such certificate, plus any mortgage tax required to be paid upon recording such certificate, and the amount so certified, plus such mortgage tax, shall, for all purposes, be secured by said bond and mortgage and be collectible thereunder.

THIRTEENTH: During the construction of the building, the Lender and the holder of the mortgage, and the Lender's Architect and Engineer, are authorized and empowered from time to time to enter upon the premises and inspect the building, and on demand the Borrower agrees to supply, if required by such Architect and/or Engineer, copies of all plans, detailed plans, shop drawings and specifications relating to the construction of the building; and they are further authorized and empowered to examine all plans, detailed plans, shop drawings and specifications which are kept at the work. The Borrower shall pay Lender's inspection fees.

FOURTEENTH: Borrower shall place through Remsen Brokerage Company, Inc., 166 Remsen Street, Brooklyn, N. Y., or any other insurance broker, designated by The Prudence Company, Inc., from the date hereof until the expiration of

said mortgage, all fire, lightning, ~~workmen's compensation, tornado, flood, earthquake~~ and steam boiler explosion insurance together with any other insurance deemed necessary by Lender, and any surety company bonds, affecting the buildings and improvements on said premises. 1741

FIFTEENTH: The Borrower agrees to pay the recording tax upon the mortgage, the cost of revenue stamps on the bond, the charges for drawing and recording papers, and for all searches which may be required by the Lender to satisfy the Lender that the mortgage is a lien as herein covenanted, also, the charges of the title company insuring the title to the Lender for examination of title, advances and policy of mortgage insurance, the application for such insurance to be placed through the Lender's attorney; the Borrower shall from time to time furnish to the Lender, or the Lender may procure at the expense of the Borrower, surveys made by a surveyor satisfactory to the Lender, whenever the Lender shall require such surveys. The Borrower also agrees to pay to the Lender a fee of FOUR HUNDRED THOUSAND DOLLARS ($400,000.) ($25,000.) of which has been heretofore paid and the receipt whereof is hereby acknowledged), ~~DOLLARS~~ at the date hereinafter set for closing, as part consideration for the Lender's agreement to make this loan. ~~If the Borrower refuses or fails to close this loan, and to execute and deliver the instruments herein provided for, and if the Lender be not in default, the entire damages which Lender will thereby sustain cannot be determined exactly therefore the Borrower and the Lender hereby agree that in the~~ 1742 1743

1744 ~~event of such default upon Borrower's part, the Borrower shall pay to the Lender the amount of said fee on the date herein set forth for closing, as liquidated damages for the refusal or failure of the Borrower to perform this agreement completely, or at the Lender's option, in case of such default by the Borrower, the Lender may require that the Borrower fully comply with all the terms of this agreement.~~

SIXTEENTH: This loan shall close at the office of 331 Madison Ave.,

THE PRUDENCE COMPANY, INC., ~~162 Remsen Street,~~
1745 New York City,
~~Brooklyn, N. Y.,~~ on September 24th, 1929, ~~or prior thereto upon five days' written notice to the Bor-~~ and said time of closing shall be of the essence of this agreement. The Borrower agrees at the time of closing to execute and deliver said bond and mortgage and all other instruments herein provided for. The Borrower shall not use a corporate name containing the words "Prudence" or "Realty Associates" or any word similar thereto.

SEVENTEENTH: The Borrower agrees to erect upon the premises described in Schedule "A" the
1746 building more particularly described in Schedule "B" according to the plans and specifications prepared by FRANK GRAD, Architect, of No. 521 Fifth Avenue, New York City, heretofore submitted to the Lender, and amendments thereto made by the Lender in a memorandum dated September 24th, 1929, and initialed by the Lender and Borrower.

EIGHTEENTH: The Borrower agrees that it has caused the aforesaid plans for the building to be erected on the premises described in Schedule "A" herein, to be filed with the Municipal and State departments having jurisdiction thereof, and that the Borrower will obtain the approval of such plans by said departments on or before said closing date, and it is understood and agreed that the Lender shall not be required to make any advances of the loan herein provided for unless at or prior to said closing date the Borrower shall exhibit to the Lender the proper permits and certificates of approval of said plans issued by the departments having jurisdiction thereof, authorizing the erection of the building shown on the plans referred to herein and such approval and permits shall be in full force and effect on the day of the closing of this loan. 1747 1748

NINETEENTH: Subject to all of the terms, covenants and conditions of this agreement, the Lender agrees to make to the Borrower at the time of closing herein set forth, a first advance of THREE MILLION TWO HUNDRED FIFTY THOUSAND DOLLARS ($3,250,000.) gross, and such advance may be made by the Lender without the approval of the appraisers of the Lender, anything herein contained to the contrary notwithstanding. Out of said first advance of THREE MILLION TWO HUNDRED AND FIFTY THOUSAND DOLLARS ($3,250,000.), the Borrower agrees to pay to the Lender all fees, commissions, disbursements and other charges agreed to be paid by the Borrower herein. All subsequent advances shall be made by the Lender to the Borrower on the basis of seventy-five per- 1749

1750 cent of the value of the labor and materials installed and incorporated in the construction of the building described in Schedule "B" herein, as determined by the appraisers of the lender.

In the event that any of the equipment provided for in said plans and specifications has not been installed in the building described herein, the Lender shall retain from the final advance a sum of money equal to the cost of such equipment to be held by the Lender until the installation thereof in said building.

TWENTIETH: The Borrower represents to the
1751 Lender that BARCLAY-ARROW HOLDING CORPORATION is now the owner and holder of a mortgage in principal amount TWO MILLION DOLLARS ($2,000,000.) upon which the principal sum of ONE MILLION FOUR HUNDRED THOUSAND DOLLARS ($1,400,000.) is now owing, covering the premises described in Schedule "A" and that there is an agreement made in connection with said mortgage now in full force and effect, which provided that upon the completion of the building to be erected on the premises described in Schedule "A" hereof, as herein provided, the holder of said mortgage will advance to the holder of said premises
1752 and additional sum of SIX HUNDRED THOUSAND DOLLARS ($600,000.), making said mortgage a lien upon said premises in the principal sum of TWO MILLION DOLLARS ($2,000,000.), and the Borrower further represents that said agreement to advance the additional sum of SIX HUNDRED THOUSAND DOLLARS ($600,000.) on said mortgage of TWO MILLION DOLLARS ($2,000,000.) is guaranteed by Frederick Brown. The Borrower further repre-

sents that said mortgage of Two Million Dollars 1753
($2,000,000.) shall be and continue to be subject and subordinate to the first mortgage of Six Million Six Hundred and Fifty Thousand Dollars ($6,650,000.) and interest to be made by the Borrower to the Lender as herein provided, and to all advances at any time made thereon, and the Borrower agrees to obtain an agreement in form and substance satisfactory to counsel for the Lender, subordinating said mortgage of Two Million Dollars ($2,000,000.) to said first mortgage of Six Million Six Hundred and Fifty Thousand Dollars ($6,650,000.) to be made to the Lender.

The failure of the Lender to require the strict 1754
performance in any one or more instances of any of the terms, covenants and conditions of this agreement shall not be construed as waiving, releasing or relinquishing for the future any such terms, covenants or conditions, but the same shall continue and remain in full force and effect.

Any notice by the Lender to the Borrower may be given and shall be deemed to have been duly given if either delivered personally or mailed in any general or branch Post Office in New York City, enclosed in a registered postpaid envelope, addressed to the Borrower at No. 1359 Broadway, 1755
Borough of Manhattan, City, County and State of New York, and if an address for notices has been duly changed, as herein provided, if so enclosed, mailed and addressed to the changed address. The Borrower may at any time change the address for notices by delivering or mailing as aforesaid, to the Lender at least five days' notice stating the change and setting forth the changed address.

1756 THE STIPULATIONS aforesaid apply to and bind the successors of the respective parties. This contract shall not be assigned, except with the written consent of the Lender.

IN WITNESS WHEREOF, the parties hereto have duly signed and sealed these presents the day and year first above written.

CENTRAL PARK PROPERTIES, INC.,
By: AELEFCOURT
President.

THE PRUDENCE COMPANY, INC.,
1757 OK
A.J.
By: H.E. MERRIAM
Vice Pres.

MBIGELOW
Asst Secy

[SEAL]

ATTEST:

LOUIS HAAS,
Secretary.

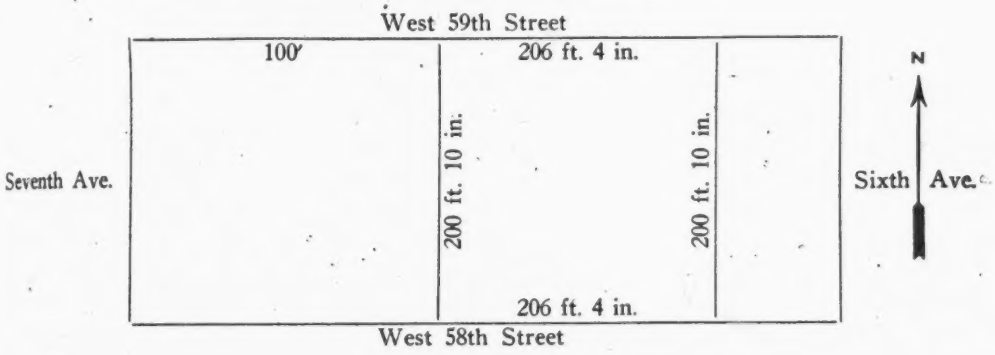
[SEAL]

1758

SCHEDULE A. 1759

Description of Premises.

The mortgage herein referred to shall cover premises situated in the Borough of Manhattan, County of New York City and State of New York, bounded and described as follows:



1760

SCHEDULE B.

Description of Building and Equipment.

The Borrower will erect on the premises described in Schedule "A", a modern 40 story and basement fireproof hotel, containing 1269 rooms and 687 bathrooms, together with the usual equipment installed in buildings of this type, which shall not include hotel furniture and furnishings. 1761

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:
CITY OF NEW YORK,

On this 25th day of September, in the year one thousand nine hundred and twenty-nine, before me personally came ABRAHAM E. LEFCOURT, to me

known, who, being by me duly sworn, did depose and say, that he resides in Borough of Manhattan, New York City; that he is the President of the CENTRAL PARK PROPERTIES, INC., the corporation described in and which executed the foregoing instrument; that he knows the corporate seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

ALEXANDER JOHNSTON

ALEXANDER JOHNSTON
Notary Public, Kings County
Kings Co. Clerk's No. 83, Reg. No. 198
N. Y. Co. Clerk's No. 252; Reg. No. 0-170
Bronx Co. Clerk's No. 17; Reg. No. 3045
Queens Co. Clerk's No. 1517; Reg. No. 4341
Commission expires March 30, 1930

STATE OF NEW YORK,
COUNTY OF NEW YORK,
CITY OF NEW YORK, } ss.:

On this 25th day of September, in the year one thousand nine hundred and twenty-nine, before me personally came H. E. MERRIAM, to me known, who, being by me duly sworn, did depose and say, that he resides in Borough of Brooklyn, New York City; that he is the Vice President of THE PRUDENCE COMPANY, INC., the corporation described in and which executed the foregoing instrument; that he knows the corporate seal of said corporation; that the seal affixed to said instrument is

such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order. 1765

ALEXANDER JOHNSTON
ALEXANDER JOHNSTON
Notary Public, Kings County
Kings Co. Clerk's No. 83, Reg. No. 198
N. Y. Co. Clerk's No. 252; Reg. No. 0-170
Bronx Co. Clerk's No. 17; Reg. No. 3045
Queens Co. Clerk's No. 1517; Reg. No. 4341
Commission expires March 30, 1930

(Endorsements on back of Building Loan Agreement.) 1766

No. 10632

CENTRAL PARK PROPERTIES, INC.,

WITH

THE PRUDENCE COMPANY, INC.

BUILDING LOAN AGREEMENT

THE LAND AFFECTED BY THE WITHIN INSTRUMENT LIES IN SECTION 4 IN BLOCK 1011 1767
ON THE LAND MAP OF THE COUNTY OF
New York.

ORIGINAL FILED IN.....

BY.....

DATE.....

1768 SUGGESTIONS AND REMINDERS TO THE BORROWER:

1. The borrower should immediately order and furnish to lender a survey of the premises acceptable to and guaranteed to the Title Company.

2. If there are any unpaid franchise taxes against the borrower or any corporation in the chain of title, the borrower should immediately arrange for the filing of reports with the proper State authorities and the payment of such taxes.

3. The borrower should immediately cause the removal of any violations filed against the prem-
1769 ises by any department of the City or State of New York or any municipality, and dispose of any mechanics' liens or other liens upon or objections to the title of the premises.

4. The borrower should produce at the closing, tax and water receipts and franchise tax receipts for the current year, with insurance policies now on premises and also any leases, easement, setback or other agreements affecting the premises.

5. The lender will appreciate having you bring to the attention of any mortgagee receiving money at the closing, that Prudence-Bonds and Prudence
1770 Mortgage Certificates secured by first mortgages on improved, income-producing property, are available for reinvestment of such funds.

Plaintiff's Exhibit 2.

1771

(Surety Bond.)

Prudence Completion Bond No. 287

KNOW ALL MEN BY THESE PRESENTS: That we, CENTRAL PARK PROPERTIES, INC., a New York corporation, having its principal place of business at No. 1359 Broadway, in the Borough of Manhattan, City, County and State of New York; (hereinafter sometimes called the "Principal"), as Principal, and FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a corporation organized and existing under the Laws of Maryland, and authorized to transact business in the State of New York, having an office 1772
at No. 55 Liberty Street, in the Borough of Manhattan, City, County and State of New York, and AMERICAN BONDING COMPANY OF BALTIMORE, a corporation organized and existing under the Laws of Maryland, and authorized to transact business in the State of New York, having an office at No. 16 Court Street, Borough of Brooklyn, County of Kings, City and State of New York, (hereinafter sometimes called the "Surety"), as Sureties, are jointly and severally held and firmly bound unto THE PRUDENCE COMPANY, INC., a New York corporation, having its principal place of business at No. 331 Madison Avenue, in the Borough of 1773
Manhattan, City, County and State of New York, (hereinafter sometimes called the Obligee), as OBLIGEE, in the principal sum of THREE MILLION ($3,000,000.) DOLLARS, lawful money of the United States of America, for the payment whereof to the said Obligee, its successors and assigns, the said Principal and the said Sureties hereby bind themselves and their respective successors and assigns, jointly and severally firmly by these presents.

Sealed with our seals and dated the 25th day of September, in the year one thousand nine hundred and twenty-nine.

WHEREAS, the said Principal and the said Obligee have entered into a certain building loan agreement dated the 24th day of September, 1929, and duly filed in the office of the Clerk of the County of New York on the day of September, 1929, providing among other things for a certain building loan in the principal amount of SIX MILLION SIX HUNDRED AND FIFTY THOUSAND ($6,650,000) DOLLARS, to be made by the Obligee to the Principal, upon the terms and conditions therein set forth and to be secured by the bond and first mortgage of the Principal, covering premises located in the Borough of Manhattan, City, County and State of New York, bounded and described as follows:

BEGINNING at a point on the southerly side of 59th Street, distant one hundred feet (100′) easterly from the corner formed by the intersection of the easterly side of 7th Avenue with the southerly side of 59th Street; thence southerly and parallel with 7th Avenue two hundred feet ten inches (200′ 10″) to the northerly side of 58th Street; thence easterly along the northerly side of 58th Street two hundred six feet four inches (206′ 4″); thence northerly again parallel with 7th Avenue two hundred feet ten inches (200′ 10″) to the southerly side of 59th Street; thence westerly along the southerly side of 59th Street two hundred six feet four inches (206′ 4″) to the point or place of beginning. and said building loan agreement and all and singular the terms thereof are hereby made a part of this bond by reference

thereto with the same force and effect as if set forth in full in the body hereof, being hereinafter referred to as the "building loan agreement"; and, 1777

WHEREAS, the Principal, among other things, has agreed to erect, construct and complete on the said described premises a modern forty (40) story and basement fireproof hotel containing twelve hundred and sixty-nine (1269) rooms and six hundred eighty-seven (687) bathrooms, together with electric refrigeration and the usual equipment installed in buildings of this type, excepting hotel furniture and furnishings; and, 1778

WHEREAS, the said building is to be erected, constructed and completed in accordance with the plans and specifications prepared by FRANK GRAD, Architect, of No. 521 Fifth Avenue, New York City, heretofore delivered by the Principal to the Obligee, and amendments thereto made by the Obligee in a memorandum dated September 24, 1929, and said plans and specifications and the amendments thereto ~~and also in accordance with the existing standard specification requirements of the Obligee for the construction of fireproof buildings, and said plans and specifications and said standard specification requirements~~ are hereby referred to and incorporated in and made a part hereof with the same force and effect as if set forth in full in the body hereof, being hereinafter together referred to as the "plans and specifications"; and, 1779

WHEREAS, pursuant to the provisions of said building loan agreement the Principal has made, executed and delivered, or is about to make, execute and deliver to the Obligee, its certain bond

and first mortgage, each dated September 24th, 1929, in principal amount FOUR MILLION ONE HUNDRED FIFTY THOUSAND DOLLARS ($4,150,000.), covering the said described premises, and said Principal and Obligee have entered into, or are about to enter into, a certain agreement bearing even date with said bond and mortgage, spreading the liens of four certain other mortgages on which there remains unpaid the aggregate principal sum of TWO MILLION FIVE HUNDRED THOUSAND DOLLARS ($2,500,000.) over the said described premises, and consolidating said four mortgages with the above described mortgage of FOUR MILLION ONE HUNDRED FIFTY THOUSAND DOLLARS ($4,150,000.) into a single first mortgage in the principal amount of SIX MILLION SIX HUNDRED FIFTY THOUSAND DOLLARS ($6,650,000.), covering said described premises; and,

~~WHEREAS, pursuant to the provisions of said building loan agreement, the Principal has made, executed and delivered to the Obligee its certain bond and first mortgage, respectively dated ; in principal amount DOLLARS, covering the said described premises; and,~~

WHEREAS, the Principal has agreed to deliver of $3,000,000., to the Obligee a surety bond in the amount/~~of said loan~~ in a company satisfactory to the Obligee, to be in form and contents satisfactory to the Obligee, conditioned upon and guaranteeing completion of the said described building not later than the 16th day of December, 1930, in strict accordance with the said building loan agreement and the said plans and specifications and free from

liens or claims, and the Obligee has consented to accept this bond; and, 1783

WHEREAS, the Principal and Surety are thoroughly familiar with all of the terms, provisions, conditions and requirements contained in said building loan agreement and with the said plans and specifications and all of the details thereof, and are duly authorized and empowered to make, execute and deliver this bond by their respective boards of directors;

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION IS SUCH:

THAT IF the said Principal shall from the date hereof continuously proceed with reasonable speed and in a workmanlike manner with the construction and completion of said building in accordance with the terms, provisions and conditions of said building loan agreement and the said plans and specifications, so that the said building shall be well and truly constructed and completed in strict accordance with said building loan agreement and with said plans and specifications and fully completed and ready for occupancy as a modern hotel not later than the 16th day of December, 1930, together with all equipment ~~and furnishings~~ customary in a building of the type provided for in said building loan agreement, installed not later than the said 16th day of December, 1930, in all respects fully complying with the building Code of the City of New York,
and with all laws, rules, ordinances, regulations and requirements of the County of New York, City of New York, and State of New York,
and any governmental bureau, department, officer or agent applicable to the erection 1784 1785

and construction of said building or to the use and occupancy thereof, and the Board of Fire Underwriters having jurisdiction thereof, and free and clear of and from any and all mechanics' or materialmen's liens or other liens, claims of architects, conditional sale contracts, chattel mortgages and charges for work and labor performed or for materials, machinery, fixtures, refrigerating units, appliances, equipment ~~or furnishings~~ used, ~~furnished~~ or installed in or about the said building, and any municipal violations against said premises and the improvements thereon; AND IF said Principal shall pay the entire cost of the erection, construction and completion of said building, and for all equipment ~~and furnishings~~ to be installed therein in accordance with said building loan agreement and plans and specifications; AND IF the said Surety shall fully indemnify and save harmless said Obligee, its successors and assigns, from and against any and all loss or damage by reason of failure of the Principal to construct, fully pay for and complete said building and install, supply and fully pay for such equipment ~~and furnishings~~ within the time aforesaid and as provided for in said building loan agreement and plans and specifications; AND IF said Surety shall make good any and every default on the part of the Principal in constructing, paying for and completing said building and supplying, installing and paying for equipment ~~and furnishings~~ as aforesaid, and shall make good any and every other default by the Principal in performing any of the other terms, covenants or conditions in said building loan agreement set forth by the Principal to be kept and performed up to

and including the completion of and payment for 1789
said building and installation of and payment for said equipment ~~and furnishings~~ in accordance with said building loan agreement and plans and specifications, free and clear as aforesaid, within the time aforesaid and in the manner that the Principal is obligated to keep and perform the same, and shall fully indemnify and save harmless the Obligee, its successors and assigns, from and against any and all loss or damage by reason of any and all claims, costs, suits, judgments, counsel fees and damages which may be incurred or suffered by the Obligee in making good any default on the part of the Principal and/or Surety, and 1790
shall fully comply with the terms, covenants and conditions hereinbefore and hereinafter set forth on the part of the Principal and/or Surety to be performed; THEN this obligation to be and become void, otherwise to remain in full force and effect.

AND THE PRINCIPAL AND SURETY JOINTLY AND SEVERALLY COVENANT AND AGREE WITH THE OBLIGEE AS FOLLOWS:

FIRST: Immediately upon either the premises being vacated or deserted or upon any default by the Principal and/or Surety, the Obligee may em- 1791
ploy watchmen for the protection of the premises and materials thereon and the work theretofore performed and may enter upon the premises and may take possession of the same and of all materials, plant, machinery, tools, appliances, equipment ~~and furnishings~~ on the premises and may do anything necessary or proper in the judgment of the Obligee to protect the property from the elements, depredation or other injury or damage, and the Principal and Surety jointly and severally

1792 agree to repay to the Obligee on demand any and all sums of money paid by the Obligee for the purposes authorized by this paragraph, with interest at the rate of six per centum per annum from the time or times of any such payment or payments made by the Obligee.

SECOND: In the event of any default on the part of the Principal, the Obligee agrees to deliver to the Surety a written notice of such default within thirty days after at least two executive officers of the Obligee shall have actual notice of such default. The Principal agrees
1793 that the Surety shall have the right within twenty days after receipt of such notice to diligently proceed with or procure others to diligently proceed with the construction and completion of said building and the supplying and installing of equipment ~~and furnishings~~ therein and performance of the other obligations hereunder as the same are agreed to be performed by the Principal and within the time aforesaid, and the Obligee by the acceptance of this bond consents to the exercise of such right by the Surety. And the Principal and Obligee agree that in the event the Surety exercises such right, then the Obligee shall (so long
1794 as no mechanics' lien or other liens are filed against the premises and there are no encumbrances thereon) place at the disposal of the Surety for its use in the exercise of such right, unadvanced amounts of money which would have been receivable by the Principal from the Obligee under said building loan if the Principal had not committed any default, and the amounts to be placed at the disposal of the Surety as aforesaid shall be paid by the Obligee to the Surety upon application for advances to be made by the Surety

under and subject to the terms of said building loan agreement covering payments of advances to said Principal in the same manner and to the same effect and with the same requirements as to freedom from lien, encumbrances, title defects and as to payment of interest, taxes, insurance premiums and otherwise as if such applications were in fact made by the Principal. The amounts of money which may be payable by the Obligee to the Surety in any contingency pursuant to the provisions of this paragraph are expressly limited to the amounts not theretofore advanced or applied by the Obligee under said building loan and are subject to the aforesaid conditions upon the making of such advances. Applications for unadvanced moneys shall be made in writing and shall specify in detail the work incorporated in the building from the date on which the Surety exercises such right, until the date or dates of application, together with the cost of each item, and such applications shall not be made by the Surety more than once in any calendar month. Should any amounts of money not advanced by the Obligee to the Principal under said building loan or applied thereunder, be and become payable to the Surety under the provisions of this paragraph, then and in such case the Principal hereby irrevocably authorizes, empowers and directs the Obligee, its successors or assigns, to accept the receipt of the Surety or its duly authorized officer or officers, agent or agents, on the bond or obligations of the Principal made to the Obligee evidencing said loan for any and all advances made by the Obligee to the Surety in accordance with the provisions hereof, and any and all such advances so made shall be fully secured by the bond and mortgage

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hereinbefore referred to with the same force and effect as if the advances were made directly to the said Principal, and any receipt for moneys so paid to the Surety on the said bond or obligations of the Principal may be made in the name of the Principal by the Surety as agent and attorney-in-fact irrevocably hereby duly authorized, or by the Surety in its own name, with the same force and effect as if such payments had been made to the Principal itself on its said bond or obligations and receipt therefor had been given by the Principal, and the Obligee, its successors or assigns, are likewise hereby irrevocably authorized to accept as the act of the Principal any payment, receipt, check endorsement or other paper or instruments made by the Surety in connection with any such advance or advances of principal made to the Surety, as binding upon the Principal and with the same force and effect as if the same were in fact made by the Principal. Anything herein contained to the contrary notwithstanding, it is a condition precedent to any and every such advance paid to the Surety that each and every such advance be so made as to be secured by the first lien of such mortgage, and that any such advance to the Surety shall be made in manner satisfactory to the title company employed to insure the first lien of said mortgage so that it will so insure the same to the extent of the full amount of moneys advanced thereon. The provisions of this paragraph "Second" shall not in any event relieve the Surety from performance of any of its obligations under this bond and all moneys required to cure any default shall be provided by the Principal and/or Surety.

THIRD: Should the Obligee give the Surety written notice of any default of the Principal as aforesaid, and (1) should the Surety for twenty days after receipt of such notice fail to diligently proceed with or procure others to diligently proceed with the construction and completion of said building and the supplying and installation of said equipment ~~and furnishings~~ therein, or (2) if the Surety shall proceed with or procure others to proceed with the work and at any time thereafter shall default in diligently and continuously proceeding with the construction and completion of said building and the supplying and installation of said equipment ~~and furnishings~~ therein, as aforesaid, free and clear of and from all mechanics' and materialmen's liens or other liens, claims of architects, conditional sale contracts, chattel mortgages and charges for work and labor performed or for materials, machinery, fixtures, appliances, equipment ~~or furnishings~~ used, furnished or installed in or about the said building, and free from municipal violations against the premises or improvements thereon, or (3) if the Surety shall default in performance of any of the other obligations of the Principal, as the same are agreed to be performed by the Principal and within the time aforesaid; then, upon the happening of any or either of such events, the Obligee (in addition to being authorized to exercise all of the powers granted by paragraph "First" hereof) shall be entitled to take over and use all materials, plant, machinery, tools, appliances, equipment and furnishings on the premises or on the street or sidewalks or on areas or other places adjacent or near to said premises in and toward the construction and completion of said building and the

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equiping thereof as aforesaid, and may construct and complete such building in general accordance with said building loan agreement and plans and specifications as the same may be changed from time to time, and/or may employ a contractor, sub-contractors, architects, superintendent, foremen, mechanics and labor and purchase materials, plant, machinery, fixtures, equipment ~~and furnishings~~ for such work, and may do all other acts and things deemed necessary or proper by the Obligee to complete and equip the said building in accordance with the building loan agreement and plans and specifications and/or may expend any moneys necessary to cause the removal of any municipal violations against the premises or improvements thereon, or to comply with any requirements of the Board of Fire Underwriters having jurisdiction thereof, and/or may pay, bond or otherwise cause the cancellation and discharge of any and all mechanics' and materialmen's liens or other liens, claims of architects, conditional sales contracts, chattel mortgages and charges for work and labor performed or for materials, plant, machinery, fixtures, equipment ~~and furnishings~~ used, installed or entering into the construction of said building, and the Principal and Surety jointly and severally agree to repay to the Obligee on demand any and all sums of money paid by the Obligee for the purposes authorized by this paragraph, with interest at the rate of six per centum per annum from the time or times of any such payment or payments made by the Obligee. If at any time the Obligee shall take over the work of constructing and completing said building, supplying or installing such equipment ~~and furnishings~~, it is under-

stood and agreed that the Obligee does not thereby assume any obligation to complete the said building, and the right of the Obligee to repayment from time to time for moneys expended hereunder, with interest, shall not in any case be affected by any failure on its part to complete the said building, nor shall the Surety be thereby released from its obligation to complete, equip and ~~furnish~~ said building. 1807

FOURTH: In the event that there are at any time any liens, judgments or claims of record of any nature against the premises prior to the expiration of this bond, then, within thirty days after notice in writing from the Obligee, requesting removal of any mechanics' or materialmen's liens or other liens, municipal violations or charges or claims of record of any nature against the premises or any improvements thereon or said equipment ~~or furnishings,~~ the Surety agrees at its own expense to remove the same or cause the same to be removed and cancelled of record, and in default thereof, the Obligee may cause such removal or cancellation of record by payment, bonding or in any other manner, and the Surety shall repay to the Obligee any moneys expended by the Obligee in payment, bonding or cancellation of any such liens or other items mentioned, with any counsel fees, plus interest at the rate of six per centum per annum from the time or times of any such payments by the Obligee. 1808 1809

FIFTH: No changes from said plans and specifications above referred to, including any changes in the design or cubic contents of or the materials

1810 or equipment in said building or in the performance of the work of construction of said building, and no delay, neglect or failure of the Obligee to proceed promptly or otherwise to enforce the completion of said building by the Principal or enforce any remedy it may have against the Principal, and no act done or omission of or action or proceeding taken by the Obligee in case of any default by the Principal, shall in any respect release or relieve the Principal or Surety from their obligations hereunder (which shall also include all such changes). Any waiver or release by the Obligee of any default or omission by the
1811 Principal and/or Surety in complying with said building loan agreement or plans and specifications or with the provisions of this bond, must be in writing and signed by the duly authorized officers of the Obligee in order to be binding upon the Obligee, and any such waiver or release shall apply only to the item or items specifically so released. In the event a conflict at any time exists between the provisions of the building loan agreement and the plans and specifications, the plans and specifications shall control as to any such conflicting item or items.
1812 The Surety hereby waives any and all legal requirements that the Obligee institute action or proceedings at law or in equity against the Principal or exhaust its remedies against the Principal as a condition precedent to action against the Surety, but the Principal shall be made a party to any such suit or action if service can be obtained upon the Principal with reasonable diligence, it being the intention of this instrument that the

Obligee may institute any action or pursue any remedy under this instrument against the Surety immediately after any default by the Principal in constructing, completing, equiping, ~~furnishings,~~ or paying for the said building in accordance with said building loan agreement and plans and specifications. All remedies afforded to the Obligee hereunder are cumulative and shall be construed as not limiting or prejudicing any other legal or equitable remedy which the Obligee may have in the premises. The provisions of this bond shall inure to the benefit of the Obligee, its successors and assigns. 1813

SIXTH: The words "Principal", "Surety" and "Obligee", wherever herein employed, respectively refer to, include and comprehend the plural of Principal, Surety and/or Obligee in any and every case where more than one Principal, Surety and/or Obligee is a party to this bond; and reference to the "successors and assigns" of "Principal", "Surety" and/or "Obligee" shall include and comprehend the successors and assigns of each and every principal, surety and/or obligee party to this bond, and their heirs and personal representatives (if any). The word "its" shall include and comprehend the masculine and/or feminine gender wherever proper. The word "building", wherever herein employed, refers to, includes and comprehends the building and improvements provided to be erected under said building loan agreement and plans and specifications. 1814 1815

It is understood that the word "equipment", as used herein shall not be deemed to include fur-

niture and furnishings and that the Obligor is not obligated to furnish the building.

SEVENTH: The total liability of the Surety under this bond shall not in any event exceed the penalty of this bond.

EIGHTH: All liability under this bond shall cease and terminate four months and one day after the happening of the last to occur of the following three events: (1) the said building shall and have been fully completed, /equipped ~~and furnished~~ as hereinbefore provided for, and the last item of work shall have been performed and of, and materials, /equipment ~~and furnishings~~ installed in accordance with the building loan agreement and plans and specifications, free and clear of all liens, claims of architects, conditional sale contracts, chattel mortgages, encumbrances, violations or claims on account of construction, /equipment ~~or furnishings;~~ (2) the said bond and mortgage shall have been fully advanced by the Obligee to the full principal amount thereof, and the title company employed to issue the mortgage insurance on said premises shall have insured the first lien of said mortgage on the premises therein described in such amount to the Obligee free and clear of all liens, ~~claims of architects,~~ conditional sale contracts, chattel mortgages, encumbrances, ~~violations~~ or claims or charges on account of the or construction, /equipment ~~or furnishing~~ of said building.

IN WITNESS WHEREOF, the said Principal and the 1819
said Sureties have caused this instrument to be
signed and executed by their proper officers there-
unto duly authorized, on the day, month and year
first above written.

CENTRAL PARK PROPERTIES, INC.,
By: A. E. LEFCOURT
President.

ATTEST:

LOUIS HAAS
Secretary.

FIDELITY AND DEPOSIT COMPANY 1820
OF MARYLAND,
[SEAL]
By: H. R. C. Hickey
Attorney-in-Fact.

ATTEST:

W. J. MESKILL
Attorney-in-Fact.

AMERICAN BONDING COMPANY OF
BALTIMORE,
[SEAL]
By: H. R. C. Hickey
Attorney-in-Fact. 1821

ATTEST:

W. J. MESKILL
Attorney-in-Fact.

Surety Bond

1822 STATE OF NEW YORK
COUNTY OF ~~KINGS~~ NEW YORK } ss.:

On this 25th day of September, in the year one thousand nine hundred and twenty-nine, before me personally came ABRAHAM E. LEFCOURT, to me known, who, being by me duly sworn, did depose and say that he resides in Borough of Manhattan, New York City,; that he is the President of CENTRAL PARK PROPERTIES, INC., the corporation described in and which executed the foregoing instrument; that he knows the corporate seal of said corporation; that the seal affixed to said in-
1823 strument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation; and that he signed his name thereto by like order.

ALEXANDER JOHNSTON
ALEXANDER JOHNSTON
Notary Public, Kings County
Kings Co. Clerk's No. 83, Reg. No. 198
N. Y. Co. Clerk's No. 252; Reg. No. 0-170
Bronx Co. Clerk's No. 17; Reg. No. 3045
Queens Co. Clerk's No. 1517; Reg. No. 4341
Commission expires March 30, 1930

1824 Form NY2171—2500, 8-27-29 34074

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

On the 25th day of September, in the year 1929, before me personally came W. J. Meskill to me known, who, being by me duly sworn, did depose and say that he resides in the City of New York; that he is the Attorney-in-Fact of the FIDELITY AND DEPOSIT COMPANY OF MARYLAND, the corpora-

tion described in, and which executed the within instrument; that he knows the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order; and that the FIDELITY AND DEPOSIT COMPANY OF MARYLAND has been duly authorized to transact business in the State of New York, in pursuance of the statutes in such case made and provided; and that the liabilities of said Company do not exceed its assets as ascertained in the manner provided in Section 183, of the Insurance Law, constituting Chapter 33 of the Consolidated Laws of the State of New York. And the said W. J. Meskill further said that he is acquainted with H. R. C. Hickey and knew him to be the Attorney-in-Fact of said Company; that the signature of the said H. R. C. Hickey subscribed to the within instrument, was in the genuine handwriting of the said H. R. C. Hickey and was subscribed thereto by like order of the Board of Directors, and in the presence of him, the said W. J. Meskill

CHAS E MCCARTHY
Notary Public, N. Y. Co. No. 115, Reg. No. 1Mc-147
Certificate filed in Kings Co. No. 19, Reg. No. 1086
[SEAL] Bronx Co. 14, Reg. 3140, Queens 717, Reg. 7160
Nassau, Richmond and Westchester Cos.
Term Expires March 30, 1931

At a regular meeting of the Executive Committee of the Board of Directors of the FIDELITY AND

DEPOSIT COMPANY OF MARYLAND, held in its office in the City of Baltimore, State of Maryland, on the 22nd day of August, 1929, the following resolution was unanimously adopted:

"*Resolved,* That John A. Griffin, Wallace P. Harvey, W. J. Meskill, Robert J. Burns, Arthur H. Poole, William A. Bullock, F. Morris Miller, Frances A. Massey, H. R. C. Hickey, Herbert J. McCooey, Louis C. Field, Clarence J. Collins, N. F. Penny, Charles M. Clark, Grace Sirrine, Anna Saeger, John E. M. Salley, Perry C. Symonds, Andrew G. Schneider, Frank A. Eickhoff, Thomas P. Cummings, Joseph P. Drake, Raymond C. Laib, Madeline H. Carey, William A. Cable, Harold W. Steuer, Joseph R. Franz, Caroline Johnson and Adele D. Klauser, all of the City of New York, State of New York, be and each of them is hereby appointed Attorney-in-Fact of this Company and empowered to execute and deliver and attach the seal of the Company to any and all bonds or undertakings for or on behalf of this Company and any and all reinsurance agreements covering bonds or undertakings. Such bonds or undertakings or reinsurance agreements to be executed for the Company by any one of the Attorneys-in-Fact aforesaid, and to be attested in every instance by one other of the said Attorneys-in-Fact, as occasion may require; it being understood, however, that one of the Attorneys-in-Fact signing shall be either said John A. Griffin, Wallace P. Harvey, W. J. Meskill, Robert J. Burns, Arthur H. Poole, William A. Bullock, F. Morris Miller, Frances A. Massey, William A. Cable, Joseph R. Franz, H. R. C. Hickey, Herbert J. McCooey, Louis C. Field, Clarence J. Collins, or N. F. Penny.

Surety Bond

"This Resolution revokes that of August 1st, 1929, in behalf of Wallace P. Harvey, *et al.*"

I, W. J. Meskill Attorney-in-Fact of the FIDELITY AND DEPOSIT COMPANY OF MARYLAND, have compared the foregoing Resolution with the original thereof, as recorded in the Minute Book of said Company and DO HEREBY CERTIFY that the same is a true and correct transcript therefrom, and of the whole of said original Resolution, and that the authority granted to the individuals specified in said resolution of August 22, 1929, is in full force and unrevoked as of this date. Given under my hand and the seal of the Company, at the City of New York, this 25th day of September, 1929.

W. J. MESKILL

[SEAL] W. J. Meskill

FIDELITY AND DEPOSIT COMPANY OF MARYLAND
FINANCIAL STATEMENT, JUNE 30, 1929

ASSETS

Real Estate	$2,340,000.00
Bonds and Stocks (Market valuations)	21,985,126.08
Mortgage Loans	140,660.71
Cash in Banks and Offices	1,684,074.57
Agents' Debit Balances (Subsequent to April 1, 1929)	2,541,553.85
Agents' Debit Balances (Prior to April 1, 1929)	507,432.20
Reinsurance Salvage Due	155,062.25
Accounts Receivable	118,414.58
TOTAL ASSETS	$29,472,324.24

Surety Bond

1834	Agents' Debit Balances (Prior to April 1, 1929) Deducted according to rulings and regulations of various Insurance Departments	507,432.20
	TOTAL ASSETS (on basis of statement to Insurance Departments)	$28,964,892.04
	LIABILITIES	
	Reserve for Unearned Premiums	$7,749,121.38
	Reserve for Claims	6,103,693.41
	Reserve for Taxes and Expenses	1,504,038.94
1835	Reserve for Commissions	471,849.96
	Reserves, Miscellaneous	299,495.32
	Reserve for Advance Premiums and Return Premiums	161,621.42
	Reinsurance Due Other Companies	492,532.55
	TOTAL RESERVES	$16,782,352.98
	Capital Stock, Paid Up $5,000,000.00	
	Surplus and undivided Profits $7,689,971.26	
	Less Agents' Debit Balances (Prior to April 1, 1929) Deducted according to Insurance Department Regulations. (See Above) 507,432.20	
1836	Surplus and Undivided Profits (on basis of statement to Insurance Depts.) 7,182,539.06	
	Surplus to Policy-holders	12,182,539.06
		$28,964,892.04

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.: 1837

W. J. Meskill being duly sworn, says that he is the Attorney-in-Fact of the FIDELITY AND DEPOSIT COMPANY OF MARYLAND, that the foregoing is a true and correct statement of the financial condition of the said Company, as of June 30, 1929, to the best of his knowledge and belief, and that the financial condition of said Company is as favorable now as it was when such statement was made.

W. J. MESKILL
W. J. Meskill 1838

Subscribed and sworn to before me }
this 25th day of September 1929 }

CHAS E McCARTHY
Notary Public, N. Y. Co. No. 113, Reg. No. 1Mc-147
Certificate filed Kings Co. No. 19, Reg. No. 1086
[SEAL] Bronx Co. 14, Reg. 3140, Queens 717, Reg. 7160
Nassau, Richmond and Westchester Cos.
Term Expires March 30, 1931

1839

Form NY2171—500, 8-27-29 2298

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

On the 25th day of September, in the year 1929, before me personally came W. J. Meskill to me known, who, being by me duly sworn, did depose and say that he resides in the City of New York; that he is the Attorney-in-Fact of the AMERICAN

1840 BONDING COMPANY OF BALTIMORE, the corporation described in, and which executed the within instrument; that he knows the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order; and that the AMERICAN BONDING COMPANY OF BALTIMORE has been duly authorized to transact business in the State of New York, in pursuance of the statutes in such case made and provided; and that the liabilities of said Company do not exceed its assets as ascertained in the manner provided in
1841 Section 183, of the Insurance Law, constituting Chapter 33 of the Consolidated Laws of the State of New York. And the said W. J. Meskill further said that he is acquainted with H. R. C. Hickey and knew him to be the Attorney-in-Fact of said Company; that the signature of the said H. R. C. Hickey subscribed to the within instrument, was in the genuine handwriting of the said H. R. C. Hickey and was subscribed thereto by like order of the Board of Directors, and in the presence of him, the said W. J. Meskill

CHAS E MCCARTHY

1842 Notary Public, N. Y. Co. No. 113, Reg. No. 1Mc-147

Certificate filed Kings Co. No. 19, Reg. 1086

[SEAL] Bronx Co. 14, Reg. 3140, Queens 717, Reg. 7160

Nassau, Richmond and Westchester Cos.

Term Expires March 30, 1931

At a regular meeting of the Board of Directors of the AMERICAN BONDING COMPANY OF BALTIMORE,

held in its office in the City of Baltimore, State of Maryland, on the 22nd day of August, 1929, the following resolution was unanimously adopted:

"*Resolved*, That John A. Griffin, Wallace P. Harvey, W. J. Meskill, Robert J. Burns, Arthur H. Poole, William A. Bullock, F. Morris Miller, Frances A. Massey, H. R. C. Hickey, Herbert J. McCooey, Louis C. Field, Clarence J. Collins, N. F. Penny, Charles M. Clark, Grace Sirrine, Anna Saeger, John E. M. Salley, Perry C. Symonds, Andrew G. Schneider, Frank A. Eickhoff, Thomas P. Cummings, Joseph P. Drake, Raymond C. Laib, Madeline H. Carey, William A. Cable, Harold W. Steuer, Joseph R. Franz, Caroline Johnson and Adele D. Klauser, all of the City of New York, State of New York, be and each of them is hereby appointed Attorney-in-Fact of this Company and empowered to execute and deliver and attach the seal of the Company to any and all bonds or undertakings for or on behalf of this Company and any and all reinsurance agreements covering bonds or undertakings. Such bonds or undertakings or reinsurance agreements to be executed for the Company by any one of the Attorneys-in-Fact aforesaid and to be attested in every instance by one other of the said Attorneys-in-Fact, as occasion may require; it being understood, however, that one of the Attorneys-in-Fact signing shall be either said John A. Griffin, Wallace P. Harvey, W. J. Meskill, Robert J. Burns, Arthur H. Poole, William A. Bullock, F. Morris Miller, Frances A. Massey, William A. Cable, Joseph R. Franz, H. R. C. Hickey, Herbert J. McCooey, Louis C. Field, Clarence J. Collins, or N. F. Penny.

1846 "This Resolution revokes that of August 1st, 1929, in behalf of Wallace P. Harvey, *et al.*"

I, W. J. Meskill Attorney-In-Fact of the AMERICAN BONDING COMPANY OF BALTIMORE, have compared the foregoing Resolution with the original thereof, as recorded in the Minute Book of said Company and DO HEREBY CERTIFY that the same is a true and correct transcript therefrom, and of the whole of said original Resolution, and that the authority granted to the individuals specified in said resolution of August 22, 1929, is in full force and unrevoked as of this date. Given under my
1847 hand and the seal of the Company, at the City of New York, this 2th day of September, 1929.

W. J. MESKILL
W. J. Meskill

[SEAL]

AMERICAN BONDING COMPANY OF BALTIMORE
FINANCIAL STATEMENT, JUNE 30, 1929

ASSETS

	Cash	$140,737.34
1848	Bonds and Stocks (Market valuations)	1,370,151.41
	Real Estate	59,250.00
	Agents' Debit Balances (subsequent to April 1, 1929)	122,216.73
	Agents' Debit Balances (prior to April 1, 1929)	24,769.90
	Reinsurance Commissions Due, etc.	59,938.45
	Interest Accrued	321.63
	TOTAL ASSETS	$1,777,385.46

Agents' Debit Balances (prior to April 1, 1929) deducted according to rulings and regulations of various Insurance Departments		24,769.90	1849
TOTAL ASSETS (on basis of statement to Insurance Departments)		$1,752,615.56	
LIABILITIES			
Reserve for Taxes		$29,293.71	
Reinsurance due other Companies		176,958.59	
Reserve for Advanced Premiums and Returned Premiums		5,359.09	1850
Reserve for Commissions		29,214.42	
TOTAL RESERVES		$240,825.81	
Capital Stock, Paid Up	$1,000,000.00		
Surplus and Undivided Profits	$536,559.65		
Less Agents' Debit Balances (prior to April 1, 1929) deducted according to Insurance Department regulations (See Above)	24,769.90		1851
Surplus and Undivided Profits (on basis of statement to Insurance Depts.)	511,789.75		
Surplus to Policy-holders		$1,511,789.75	
		$1,752,615.56	

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } SS.:

W. J. Meskill being duly sworn, says that he is the Attorney-in-Fact of the AMERICAN BONDING

1852 COMPANY OF BALTIMORE, that the foregoing is a true and correct statement of the financial condition of the said Company, as of June 30, 1929, to the best of his knowledge and belief, and that the financial condition of said Company is as favorable now as it was when such statement was made.

W. J. MESKILL
W. J. Meskill

Subscribed and sworn to before me, this 25th day of September, 1929.

CHAS E McCARTHY
1853 Notary Public, N. Y. Co. No. 113, Reg. No. 1Mc-147
Certificate filed Kings Co. No. 19, Reg. No. 1086
[SEAL] Bronx Co. 14, Reg. 3140, Queens 717, Reg. 7160
Nassau, Richmond and Westchester Cos.
Term Expires March 30, 1931

(Endorsement on back of Surety Bond.)

CENTRAL PARK PROPERTIES, INC.,
1854 FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
AMERICAN BONDING COMPANY OF BALTIMORE,
to
THE PRUDENCE COMPANY, INC.,

SURETY BOND

Plaintiff's Exhibit 3, consisting of 8 checks for the first advance under the Building Loan Agreement, aggregating $3,250,000, is omitted pursuant 1855
to stipulation and order (*supra*, p. 565), subject to the right of either party to submit the original checks to the Court if so advised.

Plaintiff's Exhibit 4.

(Specifications—Extracts.)

The remainder of Exhibit 4, which is a volume approximately three inches thick covering about 32 trades, has been omitted from the printed record pursuant to stipulation and order (*supra*, 1856
p. 565), subject to the right of either party to submit the original thereof to the Court.

ADDENDA No. 8.

TO

PLAIN PAINTING

OF

SPECIFICATION

FOR

160-170 WEST 59TH STREET BUILDING
SYNDICATE SUBSCRIPTION CORPORATION
OWNERS.

1857

July 12th, 1929.
H. R. S.

FRANK GRAD, Architect
521 FIFTH AVENUE,
NEW YORK CITY

NOTICE TO BIDDERS:

Please take account of the following in preparing estimates for the above building.

1. There shall be included in the work of this Contract, the furnishing of all labor and material required for the painting of all exterior metal work and wood work, including all doors, win-

1858 dows, frames, etc., all louvres, screens, frames, etc., and all exterior metal work except bronze and copper kalamein work, or shop fronts.

2. All of the above mentioned work shall receive two coats of lead and oil paint of color as selected by the Architect.

Form A2 General Conditions. Fourth Edition

The General Conditions of the Contract for the Construction of Buildings

Standard Form of The American Institute of Architects

1859 These General Conditions have received the approval of the National Association of Builders' Exchanges, the Associated General Contractors of America, the Joint Conference on Construction Contracts, the National Association of Master Plumbers, the National Association of Sheet Metal Contractors of the United States, the National Electrical Contractors' Association of the United States, the National Association of Marble Dealers, the Building Granite Quarries Association, and the Building Trades Employers' Association of the City of New York.

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Index to the Articles of the General Conditions

1. Definitions.
2. Execution, Correlation and Intent of Documents.
3. Detail Drawings and Instructions.
4. Copies Furnished.

5. Shop Drawings. 1861
6. Drawings and Specifications on the Work.
7. Ownership of Drawings and Models.
8. Samples.
9. Materials, Appliances, Employes.
10. Royalties and Patents.
11. Surveys, Permits and Regulations.
12. Protection of Work and Property.
13. Inspection of Work.
14. Superintendence: Supervision.
15. Changes in the Work.
16. Claims for Extra Cost.
17. Deductions for Uncorrected Work.
18. Delays and Extension of Time. 1862
19. Correction of Work Before Final Payment.
20. Correction of Work After Final Payment.
21. Owner's Right to do Work.
22. Owner's Right to Terminate Contract.
23. Contractor's Right to Stop Work or Terminate Contract.
24. Applications for Payments.
25. Certificates of Payments.
26. Payments Withheld.
27. Contractor's Liability Insurance.
28. Owner's Liability Insurance.
29. Fire Insurance. 1863
30. Guaranty Bonds.
31. Damages.
32. Liens.
33. Assignment.
34. Mutual Responsibility of Contractors.
35. Separate Contracts.
36. Subcontracts.
37. Relations of Contractor and Subcontractor.
38. Architect's Status.
39. Architect's Decisions.
40. Arbitration.
41. Cash Allowances.

1864 42. Use of Premises.
43. Cutting, Patching and Digging.
44. Cleaning Up.

ART. 1. DEFINITIONS.

(a) The Contract Documents consist of the Agreement, the General Conditions of the Contract, the Drawings and Specifications, including all modifications thereof incorporated in the documents before their execution. These form the Contract.

(b) The Owner, the Contractor and the Architect are those mentioned as such in the
1865 Agreement. They are treated throughout the Contract Documents as if each were of the singular number and masculine gender.

(c) The term Subcontractor, as employed herein, includes only those having a direct contract with the Contractor and it includes one who furnishes material worked to a special design according to the plans or specifications of this work, but does not include one who merely furnishes material not so worked.

(d) Written notice shall be deemed to have been
1866 duly served if delivered in person to the individual or to a member of the firm or to an officer of the corporation for whom it is intended, or if delivered at or sent by registered mail to the last business address known to him who gives the notice.

(e) The term "work" of the Contractor or Subcontractor includes labor or materials or both.

(f) All time limits stated in the Contract Documents are of the essence of the Contract.

(g) The law of the place of building shall govern the construction of this Contract. 1867

ART. 2. EXECUTION, CORRELATION AND INTENT OF DOCUMENTS.—The Contract Documents shall be signed in duplicate by the Owner and the Contractor. In case the Owner and the Contractor fail to sign the General Conditions, Drawings or Specifications, the Architect shall identify them.

The Contract Documents are complementary, and what is called for by any one shall be as binding as if called for by all. The intention of the documents is to include all labor and materials, equipment and transportation necessary for the proper execution of the work. It is not intended, however, that materials or work not covered by or properly inferable from any heading, branch, class or trade of the specifications shall be supplied unless distinctly so noted on the drawings. Materials or work described in words which so applied have a well-known technical or trade meaning shall be held to refer to such recognized standards. 1868

ART. 3. DETAIL DRAWINGS AND INSTRUCTIONS.—The Architect shall furnish with reasonable promptness, additional instructions, by means of drawings or otherwise, necessary for the proper execution of the work. All such drawings and instructions shall be consistent with the Contract Documents, true developments thereof, and reasonably inferable therefrom. 1869

The work shall be executed in conformity therewith and the Contractor shall do no work without proper drawings and instructions.

The Contractor and the Architect, if either so requests, shall jointly prepare a schedule, subject

1870 to change from time to time in accordance with the progress of the work, fixing the dates at which the various detail drawings will be required, and the Architect shall furnish them in accordance with that schedule. Under like conditions, a schedule shall be prepared, fixing the dates for the submission of shop drawings, for the beginning of manufacture and installation of materials and for the completion of the various parts of the work.

ART. 4. COPIES FURNISHED.—Unless otherwise provided in the Contract Documents the Architect will furnish to the Contractor, free of charge, all
1871 copies of drawings and specifications reasonably necessary for the execution of the work.

ART. 5. SHOP DRAWINGS.—The Contractor shall submit with such promptness as to cause no delay in his own work or in that of any other Contractor, two copies of all shop or setting drawings and schedules required for the work of the various trades, and the Architect shall pass upon them with reasonable promptness. The Contractor shall make any corrections required by the Architect, file with him two corrected copies and furnish such other copies as may be needed. The Architect's
1872 approval of such drawings or schedules shall not relieve the Contractor from responsibility for deviations from drawings or specifications, unless he has in writing called the Architect's attention to such deviations at the time of submission, nor shall it relieve him from responsibility for errors of any sort in shop drawings or schedules.

ART. 6. DRAWINGS AND SPECIFICATIONS ON THE WORK.—The Contractor shall keep one copy of all drawings and specifications on the work, in good

order, available to the Architect and to his representatives. 1873

ART. 7. OWNERSHIP OF DRAWINGS AND MODELS.—All drawings, specifications and copies thereof furnished by the Architect are his property. They are not to be used on other work and, with the exception of the signed Contract set, are to be returned to him on request, at the completion of the work. All models are the property of the Owner.

ART. 8. SAMPLES.—The Contractor shall furnish for approval all samples as directed. The work shall be in accordance with approved samples. 1874

ART. 9. MATERIALS, APPLIANCES, EMPLOYES.—Unless otherwise stipulated, the Contractor shall provide and pay for all materials, labor, water, tools, equipment, light, power, transportation and other facilities necessary for the execution and completion of the work.

Unless otherwise specified, all materials shall be new and both workmanship and materials shall be of good quality. The Contractor shall, if required, furnish satisfactory evidence as to the kind and quality of materials.

The Contractor shall at all times enforce strict discipline and good order among his employes, and shall not employ on the work any unfit person or any one not skilled in the work assigned to him. 1875

ART. 10. ROYALTIES AND PATENTS.—The Contractor shall pay all royalties and license fees. He shall defend all suits or claims for infringement of any patent rights and shall save the Owner harmless from loss on account thereof, except that the

1876 Owner shall be responsible for all such loss when a particular process or the product of a particular manufacturer or manufacturers is specified, but if the Contractor has information that the process or article specified is an infringement of a patent he shall be responsible for such loss unless he promptly gives such information to the Architect or Owner.

ART. 11. SURVEYS, PERMITS AND REGULATIONS.—The Owner shall furnish all surveys unless otherwise specified. Permits and licenses of a temporary nature necessary for the prosecution of the
1877 work shall be secured and paid for by the Contractor. Permits, licenses and easements for permanent structures or permanent changes in existing facilities shall be secured and paid for by the Owner, unless otherwise specified.

The Contractor shall give all notices and comply with all laws, ordinances, rules and regulations bearing on the conduct of the work as drawn and specified. If the Contractor observes that the drawings and specifications are at variance therewith, he shall promptly notify the Architect in writing, and any necessary changes shall be adjusted as provided in the Contract for changes in
1878 the work. If the Contractor performs any work knowing it to be contrary to such laws, ordinances, rules and regulations, and without such notice to the Architect, he shall bear all costs arising therefrom.

ART. 12. PROTECTION OF WORK AND PROPERTY.—The Contractor shall continuously maintain adequate protection of all his work from damage and shall protect the Owner's property from injury or loss arising in connection with this Contract. He

shall make good any such damage, injury or loss, 1879
except such as may be directly due to errors in the Contract Documents or caused by agents or employes of the Owner. He shall adequately protect adjacent property as provided by law and the Contract Documents. He shall provide and maintain all passage ways, guard fences, lights and other facilities for protection required by public authority or local conditions.

In an emergency affecting the safety of life or of the work or of adjoining property, the Contractor, without special instruction or authorization from the Architect or Owner, is hereby permitted to act, at his discretion, to prevent such 1880
threatened loss or injury, and he shall so act, without appeal, if so instructed or authorized. Any compensation, claimed by the Contractor on account of emergency work, shall be determined by agreement or Arbitration.

ART. 13. INSPECTION OF WORK.—The Architect and his representatives shall at all times have access to the work wherever it is in preparation or progress and the Contractor shall provide proper facilities for such access and for inspection.

If the specifications, the Architect's instructions, laws, ordinances or any public authority 1881
require any work to be specially tested or approved, the Contractor shall give the Architect timely notice of its readiness for inspection, and if the inspection is by another authority than the Architect, of the date fixed for such inspection. Inspections by the Architect shall be promptly made, and where practicable at the source of supply. If any work should be covered up without approval or consent of the Architect, it must, if

1882 required by the Architect, be uncovered for examination at the Contractor's expense.

Re-examination of questioned work may be ordered by the Architect and if so ordered the work must be uncovered by the Contractor. If such work be found in accordance with the Contract Documents the Owner shall pay the cost of re-examination and replacement. If such work be found not in accordance with the Contract Documents the Contractor shall pay such cost, unless he shall show that the defect in the work was caused by another Contractor, and in that event the Owner shall pay such cost.

1883 ART. 14.—SUPERINTENDENCE: SUPERVISION.—The Contractor shall keep on his work, during its progress, a competent superintendent and any necessary assistants, all satisfactory to the Architect. The superintendent shall not be changed except with the consent of the Architect, unless the superintendent proves to be unsatisfactory to the Contractor and ceases to be in his employ. The superintendent shall represent the Contractor in his absence and all directions given to him shall be as binding as if given to the Contractor. Important directions shall be confirmed in writing to
1884 the Contractor. Other directions shall be so confirmed on written request in each case.

The Contractor shall give efficient supervision to the work, using his best skill and attention. He shall carefully study and compare all drawings, specifications and other instructions and shall at once report to the Architect any error, inconsistency or omission which he may discover, but he shall not be held responsible for their existence or discovery.

ART. 15.—CHANGES IN THE WORK.—The Owner, 1885
without invalidating the Contract, may order extra work or make changes by altering, adding to or deducting from the work, the Contract Sum being adjusted accordingly. All such work shall be executed under the conditions of the original contract except that any claim for extension of time caused thereby shall be adjusted at the time of ordering such change.

In giving instructions, the Architect shall have authority to make minor changes in the work, not involving extra cost, and not inconsistent with the purposes of the building, but otherwise, except in an emergency endangering life or property, no 1886
extra work or change shall be made unless in pursuance of a written order from the Owner signed or countersigned by the Architect, or a written order from the Architect stating that the Owner has authorized the extra work or change, and no claim for an addition to the contract sum shall be valid unless so ordered.

The value of any such extra work or change shall be determined in one or more of the following ways:

(a) By estimate and acceptance in a lump sum.

(b) By unit prices named in the contract or 1887
subsequently agreed upon.

(c) By cost and percentage or by cost and a fixed fee.

If none of the above methods is agreed upon, the Contractor, provided he receives an order as above, shall proceed with the work. In such case and also under case (c), he shall keep and present in such form as the Architect may direct, a cor-

1888 rect account of the net cost of labor and materials, together with vouchers. In any case, the Architect shall certify to the amount, including reasonable allowance for overhead and profit, due to the Contractor. Pending final determination of value, payments on account of changes shall be made on the Architect's certificate.

ART. 16.—CLAIMS FOR EXTRA COST.—If the Contractor claims that any instructions by drawings or otherwise involve extra cost under this contract, he shall give the Architect written notice thereof within a reasonable time after the receipt
1889 of such instructions, and in any event before proceeding to execute the work, except in emergency endangering life or property, and the procedure shall then be as provided for changes in the work. No such claim shall be valid unless so made.

ART. 17. DEDUCTIONS FOR UNCORRECTED WORK.—If the Architect and Owner deem it inexpedient to correct work injured or done not in accordance with the Contract, an equitable deduction from the contract price shall be made therefor.

ART. 18. DELAYS AND EXTENSION OF TIME.—If the Contractor be delayed at any time in the progress
1890 of the work by any act or neglect of the Owner or the Architect, or of any employe of either, or by any other Contractor employed by the Owner, or by changes ordered in the work, or by strikes, lockouts, fire, unusual delay in transportation, unavoidable casualties or any causes beyond the Contractor's control, or by delay authorized by the Architect pending arbitration, or by any cause which the Architect shall decide to justify the delay, then the time of completion shall be ex-

tended for such reasonable time as the Architect may decide. 1891

No such extension shall be made for delay occurring more than seven days before claim therefor is made in writing to the Architect. In the case of a continuing cause of delay, only one claim is necessary.

If no schedule or agreement stating the dates upon which drawings shall be furnished is made, then no claim for delay shall be allowed on account of failure to furnish drawings until two weeks after demand for such drawings and not then unless such claim be reasonable.

This article does not exclude the recovery of damages for delay by either party under other provisions in the contract documents. 1892

ART. 19. CORRECTION OF WORK BEFORE FINAL PAYMENT.—The Contractor shall promptly remove from the premises all materials condemned by the Architect as failing to conform to the Contract, whether incorporated in the work or not, and the Contractor shall promptly replace and re-execute his own work in accordance with the Contract and without expense to the Owner and shall bear the expense of making good all work of other contractors destroyed or damaged by such removal or replacement. 1893

If the Contractor does not remove such condemned work and materials within a reasonable time, fixed by written notice, the Owner may remove them and may store the material at the expense of the Contractor. If the Contractor does not pay the expenses of such removal within ten days' time thereafter, the Owner may, upon ten days' written notice, sell such materials at auction

1894 or at private sale and shall account for the net proceeds thereof, after deducting all the costs and expenses that should have been borne by the Contractor.

ART. 20. CORRECTION OF WORK AFTER FINAL PAYMENT.—Neither the final certificate nor payment nor any provision in the Contract Documents shall relieve the Contractor of responsibility for faulty materials or workmanship and, unless otherwise specified, he shall remedy any defects due thereto and pay for any damage to other work resulting therefrom, which shall appear within a period of
1895 one year from the date of substantial completion. The Owner shall give notice of observed defects with reasonable promptness. All questions arising under this article shall be decided by the Architect subject to arbitration.

ART. 21. THE OWNER'S RIGHT TO DO WORK.—If the Contractor should neglect to prosecute the work properly or fail to perform any provision of this contract, the Owner, after three days' written notice to the Contractor may, without prejudice to any other remedy he may have, make good such deficiencies and may deduct the cost thereof from the payment then or thereafter due the Contractor,
1896 provided, however, that the Architect shall approve both such action and the amount charged to the Contractor.

ART. 22. OWNER'S RIGHT TO TERMINATE CONTRACT.—If the Contractor should be adjudged a bankrupt, or if he should make a general assignment for the benefit of his creditors, or if a receiver should be appointed on account of his insolvency, or if he should persistently or repeatedly refuse or should fail, except in cases for which extension

of time is provided, to supply enough properly skilled workmen or proper materials, or if he should fail to make prompt payment to subcontractors or for material or labor, or persistently disregard laws, ordinances or the instructions of the Architect, or otherwise be guilty of a substantial violation of any provision of the contract, then the Owner, upon the certificate of the Architect that sufficient cause exists to justify such action, may, without prejudice to any other right or remedy and after giving the Contractor seven days' written notice, terminate the employment of the Contractor and take possession of the premises and of all materials, tools and appliances thereon and finish the work by whatever method he may deem expedient. In such case the Contractor shall not be entitled to receive any further payment until the work is finished. If the unpaid balance of the contract price shall exceed the expense of finishing the work including compensation for additional managerial and administrative services, such excess shall be paid to the Contractor. If such expense shall exceed such unpaid balance, the Contractor shall pay the difference to the Owner. The expense incurred by the Owner as herein provided, and the damage incurred through the Contractor's default, shall be certified by the Architect.

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ART. 23. CONTRACTOR'S RIGHT TO STOP WORK OR TERMINATE CONTRACT.—If the work should be stopped under an order of any court, or other public authority, for a period of three months, through no act or fault of the Contractor or of anyone employed by him, or if the Architect should fail to issue any certificate for payment within

1900 seven days after it is due, or if the Owner should fail to pay to the Contractor within seven days of its maturity and presentation, any sum certified by the Architect or awarded by arbitrators, then the Contractor may, upon seven days' written notice to the Owner and the Architect, stop work or terminate this contract and recover from the Owner payment for all work executed and any loss sustained upon any plant or materials and reasonable profit and damages.

ART. 24. APPLICATIONS FOR PAYMENTS.—The Contractor shall submit to the Architect an application for each payment, and, if required, receipts
1901 or other vouchers, showing his payments for materials and labor, including payments to subcontractors as required by Art. 37.

If payments are made on valuation of work done, such application shall be submitted at least ten days before each payment falls due, and, if required, the Contractor shall, before the first application, submit to the Architect a schedule of values of the various parts of the work, including quantities, aggregating the total sum of the contract, divided so as to facilitate payments to subcontractors in accordance with Article 37 (e),
1902 made out in such form as the Architect and the Contractor may agree upon, and, if required, supported by such evidence as to its correctness as the Architect may direct. This schedule, when approved by the Architect, shall be used as a basis for certificates of payment, unless it be found to be in error. In applying for payments, the Contractor shall submit a statement based upon this schedule, and, if required, itemized in such form and supported by such evidence as the Architect

may direct, showing his right to the payment claimed. 1903

If payments are made on account of materials delivered and suitably stored at the site but not incorporated in the work, they shall, if required by the Architect, be conditional upon submission by the Contractor of bills of sale or such other procedure as will establish the Owner's title to such material or otherwise adequately protect the Owner's interest.

ART. 25. CERTIFICATES OF PAYMENTS.—If the Contractor has made application as above, the Architect shall, not later than the date when each payment falls due, issue to the Contractor a certificate for such amount as he decides to be properly due. 1904

No certificate issued nor payment made to the Contractor, nor partial or entire use or occupancy of the work by the Owner, shall be an acceptance of any work or materials not in accordance with this contract. The making and acceptance of the final payment shall constitute a waiver of all claims by the Owner, other than those arising from unsettled liens, from faulty work appearing after final payment or from requirement of the specifications, and of all claims by the Contractor, except those previously made and still unsettled. 1905

Should the Owner fail to pay the sum named in any certificate of the Architect or in any award by arbitration, upon demand when due, the Contractor shall receive, in addition to the sum named in the certificate, interest thereon at the legal rate in force at the place of building.

ART. 26. PAYMENTS WITHHELD.—The Architect may withhold or, on account of subsequently discovered evidence, nullify the whole or a part of

1906 any certificate to such extent as may be necessary to protect the Owner from loss on account of:

(a) Defective work not remedied.

(b) Claims filed or reasonable evidence indicating probable filing of claims.

(c) Failure of the Contractor to make payments properly to subcontractors or for material or labor.

(d) A reasonable doubt that the contract can be completed for the balance then unpaid.

1907 (e) Damage to another Contractor.

When the above grounds are removed payment shall be made for amounts withheld because of them.

ART. 27. CONTRACTOR'S LIABILITY INSURANCE.—The Contractor shall maintain such insurance as will protect him from claims under workmen's compensation acts and from any other claims for damages for personal injury, including death, which may arise from operations under this Contract, whether such operations be by himself or by any subcontractor or anyone directly or indi-
1908 rectly employed by either of them. Certificates of such insurance shall be filed with the Owner, if he so require, and shall be subject to his approval for adequacy of protection.

ART. 28. OWNER'S LIABILITY INSURANCE.—The Owner shall be responsible for and at his option may maintain such insurance as will protect him from his contingent liability for damages for personal injury, including death, which may arise from operations under this contract.

ART. 29. FIRE INSURANCE.—The Owner shall effect 1909
and maintain fire insurance upon the entire structure on which the work of this contract is to be done and upon all materials, in or adjacent thereto and intended for use thereon, to at least eighty per cent of the insurable value thereof. The loss, if any, is to be made adjustable with and payable to the Owner as Trustee for whom it may concern.

All policies shall be open to inspection by the Contractor. If the Owner fails to show them on request, or if he fails to effect or maintain insurance as above, the Contractor may insure his own interest and charge the cost thereof to the Owner. If the Contractor is damaged by failure of the 1910
Owner to maintain such insurance, he may recover as stipulated in the contract for recovery of damages.

If required in writing by any party in interest, the Owner as Trustee shall, upon the occurrence of loss, give bond for the proper performance of his duties. He shall deposit any money received from insurance in an account separate from all his other funds and he shall distribute it in accordance with such agreement as the parties in interest may reach, or under an award of arbitrators appointed, one by the Owner, another by joint 1911
action of the other parties in interest, all other procedure being as provided elsewhere in the contract for Arbitration. If after loss no special agreement is made, replacement of injured work shall be ordered and executed as provided for changes in the work.

The Trustee shall have power to adjust and settle any loss with the insurers unless one of the Contractors interested shall object in writing within three working days of the occurrence of

1912 loss, and thereupon arbitrators shall be chosen as above. The Trustees shall in that case make settlement with the insurers in accordance with the directions of such arbitrators, who shall also, if distribution by arbitration is required, direct such distribution.

ART. 30. GUARANTY BONDS.—The Owner shall have the right, prior to the signing of the Contract, to require the Contractor to furnish bond covering the faithful performance of the Contract and the payment of all obligations arising thereunder, in such form as the Owner may prescribe
1913 and with such sureties as he may approve. If such bond is required by instructions given previous to the submission of bids, the premium shall be paid by the Contractor; if subsequent thereto, it shall be paid by the Owner.

ART. 31. DAMAGES.—If either party to this Contract should suffer damage in any manner because of any wrongful act or neglect of the other party or of anyone employed by him, then he shall be reimbursed by the other party for such damage.

Claims under this clause shall be made in writing to the party liable within a reasonable time
1914 at the first observance of such damage and not later than the time of final payment, except as expressly stipulated otherwise in the case of faulty work or materials, and shall be adjusted by agreement or arbitration.

ART. 32. LIENS.—Neither the final payment nor any part of the retained percentage shall become due until the Contractor, if required, shall deliver to the Owner a complete release of all liens arising out of this Contract, or receipts in full in lieu

thereof and, if required in either case, an affidavit 1915
that so far as he has knowledge or information the releases and receipts include all the labor and material for which a lien could be filed; but the Contractor may, if any subcontractor refuses to furnish a release or receipt in full, furnish a bond satisfactory to the Owner, to indemnify him against any lien. If any lien remain unsatisfied after all payments are made, the Contractor shall refund to the Owner all moneys that the latter may be compelled to pay in discharging such a lien, including all costs and a reasonable attorney's fee.

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ART. 33. ASSIGNMENT.—Neither party to the Contract shall assign the Contract or sublet it as a whole without the written consent of the other, nor shall the Contractor assign any moneys due or to become due to him hereunder, without the previous written consent of the Owner.

ART. 34. MUTUAL RESPONSIBILITY OF CONTRACTORS.—Should the Contractor cause damage to any other contractor on the work the Contractor agrees, upon due notice, to settle with such contractor by agreement or arbitration, if he will so settle. If such other contractor sues the Owner on 1917
account of any damage alleged to have been so sustained, the Owner shall notify the Contractor, who shall defend such proceedings at the Owner's expense and, if any judgment against the Owner arise therefrom, the Contractor shall pay or satisfy it and pay all costs incurred by the Owner.

ART. 35. SEPARATE CONTRACTS.—The Owner reserves the right to let other contracts in connection with this work. The Contractor shall afford other contractors reasonable opportunity for the

1918 introduction and storage of their materials and the execution of their work, and shall properly connect and coordinate his work with theirs.

If any part of the Contractor's work depends for proper execution or results upon the work of any other contractor, the Contractor shall inspect and promptly report to the Architect any defects in such work that render it unsuitable for such proper execution and results. His failure so to inspect and report shall constitute an acceptance of the other contractor's work as fit and proper for the reception of his work, except as to defects which may develop in the other contractor's work
1919 after the execution of his work.

To insure the proper execution of his subsequent work the Contractor shall measure work already in place and shall at once report to the Architect any discrepancy between the executed work and the drawings.

ART. 36.—SUBCONTRACTS.—The Contractor shall, as soon as practicable after the signature of the contract, notify the Architect in writing of the names of subcontractors proposed for the principal parts of the work and for such others as the Architect may direct and shall not employ any
1920 that the Architect may within a reasonable time object to as incompetent or unfit.

If the Contractor has submitted before signing the contract a list of subcontractors and the change of any name on such list is required in writing by the Owner after signature of agreement, the contract price shall be increased or diminished by the difference in cost occasioned by such change.

The Architect shall, on request, furnish to any subcontractor, wherever practicable, evidence of the amounts certified on his account.

The Contractor agrees that he is as fully responsible to the Owner for the acts and omissions of his subcontractors and of persons either directly or indirectly employed by them, as he is for the acts and omissions of persons directly employed by him. 1921

Nothing contained in the contract documents shall create any contractual relation between any subcontractor and the Owner.

ART. 37. RELATIONS OF CONTRACTOR AND SUBCONTRACTOR.—The Contractor agrees to bind every Subcontractor and every Subcontractor agrees to be bound by the terms of the Agreement, the General Conditions, the Drawings and Specifications as far as applicable to his work, including the following provisions of this article, unless specifically noted to the contrary in a subcontract approved in writing as adequate by the Owner or Architect. 1922

This does not apply to minor subcontracts.

The Subcontractor agrees—

(a) To be bound to the Contractor by the terms of the Agreement, General Conditions, Drawings and Specifications, and to assume toward him all the obligations and responsibilities that he, by those documents, assumes toward the Owner. 1923

(b) To submit to the Contractor applications for payment in such reasonable time as to enable the Contractor to apply for payment under Article 24 of the General Conditions.

(c) To make all claims for extras, for extensions of time and for damages for delays or otherwise, to the Contractor in the manner provided in the General Conditions for like claims by the

1924 Contractor upon the Owner, except that the time for making claims for extra cost is one week.

The Contractor agrees—

(d) To be bound to the Subcontractor by all the obligations that the Owner assumes to the Contractor under the Agreement, General Conditions, Drawings and Specifications, and by all the provisions thereof affording remedies and redress to the Contractor from the Owner.

(e) To pay the Subcontractor, upon the issuance of certificates, if issued under the schedule of values described in Article 24 of the General
1925 Conditions, the amount allowed to the Contractor on account of the Subcontractor's work to the extent of the Subcontractor's interest therein.

(f) To pay the Subcontractor, upon the issuance of certificates, if issued otherwise than as in (e), so that at all times his total payments shall be as large in proportion to the value of the work done by him as the total amount certified to the Contractor is to the value of the work done by him.

(g) To pay the Subcontractor to such extent as may be provided by the Contract Documents
1926 or the subcontract, if either of these provides for earlier or larger payments than the above.

(h) To pay the Subcontractor on demand for his work or materials as far as executed and fixed in place, less the retained percentage, at the time the certificate should issue, even though the Architect fails to issue it for any cause not the fault of the Subcontractor.

(j) To pay the Subcontractor a just share of any fire insurance money received by him, the Contractor, under Article 29 of the General Conditions. 1927

(k) To make no demand for liquidated damages or penalty for delay in any sum in excess of such amount as may be specifically named in the subcontract.

(l) That no claim for services rendered or materials furnished by the Contractor to the Subcontractor shall be valid unless written notice thereof is given by the Contractor to the Subcontractor during the first ten days of the calendar month following that in which the claim originated. 1928

(m) To give the Subcontractor an opportunity to be present and to submit evidence in any arbitration involving his rights.

(n) To name as arbitrator under arbitration proceedings as provided in the General Conditions the person nominated by the Subcontractor, if the sole cause of dispute is the work, materials, rights or responsibilities of the Subcontractor; or, if of the Subcontractor and any other subcontractor jointly, to name as such arbitrator the person upon whom they agree. 1929

The Contractor and the Subcontractor agree that—

(o) In the matter of arbitration, their rights and obligations and all procedure shall be analogous to those set forth in this contract.

Nothing in this article shall create any obligation on the part of the Owner to pay to or to see to the payment of any sums to any Subcontractor.

1930 ART. 38. ARCHITECT'S STATUS.—The Architect shall have general supervision and direction of the work. He is the agent of the Owner only to the extent provided in the Contract Documents and when in special instances he is authorized by the Owner so to act, and in such instances he shall, upon request, show the Contractor written authority. He has authority to stop the work whenever such stoppage may be necessary to insure the proper execution of the Contract.

As the Architect is, in the first instance, the interpreter of the conditions of the Contract and the judge of its performance, he shall side neither
1931 with the Owner nor with the Contractor, but shall use his powers under the contract to enforce its faithful performance by both.

In case of the termination of the employment of the Architect, the Owner shall appoint a capable and reputable Architect, whose status under the contract shall be that of the former Architect.

ART. 39. ARCHITECT'S DECISIONS.—The Architect shall, within a reasonable time, make decisions on all claims of the Owner or Contractor and on all other matters relating to the execution and progress of the work or the interpretation of the
1932 Contract Documents.

The Architect's decisions, in matters relating to artistic effect, shall be final, if within the terms of the Contract Documents.

Except as above or as otherwise expressly provided in the Contract Documents, all the Architect's decisions are subject to arbitration.

ART. 40. ARBITRATION.—All questions subject to arbitration under this Contract shall be submitted to arbitration at the choice of either party to the dispute.

The Contractor shall not cause a delay of the work during any arbitration proceedings, except by agreement with the Owner. 1933

The demand for arbitration shall be filed in writing with the Architect, in the case of an appeal from his decision, within ten days of its receipt and in any other case within a reasonable time after cause thereof and in no case later than the time of final payment, except as otherwise expressly stipulated in the Contract. If the Architect fails to make a decision within a reasonable time, an appeal to arbitration may be taken as if his decision had been rendered against the party appealing. 1934

No one shall be nominated or act as an arbitrator who is in any way financially interested in this Contract or in the business affairs of either the Owner, Contractor or Architect.

Unless otherwise provided by controlling statutes, the parties may agree upon one arbitrator; otherwise there shall be three, one named in writing, by each party to this Contract, to the other party and to the Architect and the third chosen by these two arbitrators, or if they fail to select a third within fifteen days, then he shall be chosen by the presiding officer of the Bar Association nearest to the location of the work. Should the party demanding arbitration fail to name an arbitrator within ten days of his demand, his right to arbitration shall lapse. Should the other party fail to choose an arbitrator within said ten days, then such presiding officer shall appoint such arbitrator. Should either party refuse or neglect to supply the arbitrators with any papers or information demanded in writing, the arbitrators are empowered by both parties to proceed ex parte. 1935

1936 If there be one arbitrator his decision shall be binding; if three the decision of any two shall be binding. Such decision shall be a condition precedent to any right of legal action, and wherever permitted by law it may be filed in Court to carry it into effect.

The arbitrators, if they deem that the case demands it, are authorized to award to the party whose contention is sustained such sums as they shall deem proper for the time, expense and trouble incident to the appeal and, if the appeal was taken without reasonable cause, damages for delay. The arbitrators shall fix their own com-
1937 pensation, unless otherwise provided by agreement, and shall assess the costs and charges of the arbitration upon either or both parties.

The award of the arbitrators shall be in writing and it shall not be open to objection on account of the form of the proceeding or the award, unless otherwise provided by the controlling statutes.

In the event of such statutes providing on any matter covered by this article otherwise than as hereinbefore specified, the method of procedure throughout and the legal effect of the award shall be wholly in accordance with the said statutes, it being intended hereby to lay down a principle of
1938 action to be followed, leaving its local application to be adapted to the legal requirements of the jurisdiction having authority over the arbitration.

ART. 41. CASH ALLOWANCES.—The Contractor shall include in the contract sum all allowances named in the Contract Documents and shall cause the work so covered to be done by such contractors and for such sums as the Architect may direct, the contract sum being adjusted in conformity

therewith. The Contractor declares that the contract sum includes such sums for expenses and profit on account of cash allowances as he deems proper. No demand for expenses or profit other than those included in the contract sum shall be allowed. The Contractor shall not be required to employ for any such work persons against whom he has a reasonable objection. 1939

ART. 42. USE OF PREMISES.—The Contractor shall confine his apparatus, the storage of materials and the operations of his workmen to limits indicated by law, ordinances, permits or directions of the Architect and shall not unreasonably encumber the premises with his materials. 1940

The Contractor shall not load or permit any part of the structure to be loaded with a weight that will endanger its safety.

The Contractor shall enforce the Architect's instructions regarding signs, advertisements, fires and smoking.

ART. 43. CUTTING, PATCHING AND DIGGING.—The Contractor shall do all cutting, fitting or patching of his work that may be required to make its several parts come together properly and fit it to receive or be received by work of other contractors shown upon, or reasonably implied by, the Drawings and Specifications for the completed structure, and he shall make good after them as the Architect may direct. 1941

Any cost caused by defective or ill-timed work shall be borne by the party responsible therefor.

The Contractor shall not endanger any work by cutting, digging or otherwise, and shall not cut or alter the work of any other contractor save with the consent of the Architect.

1942 ART. 44. CLEANING UP.—The Contractor shall at all times keep the premises free from accumulations of waste material or rubbish caused by his employes or work, and at the completion of the work he shall remove all his rubbish from and about the building and all his tools, scaffolding and surplus materials and shall leave his work "broom clean" or its equivalent, unless more exactly specified. In case of dispute the Owner may remove the rubbish and charge the cost to the several contractors as the Architect shall determine to be just.

1943 SPECIAL CONDITIONS
SECTION
OF
SPECIFICATIONS
FOR
160-170 WEST 59TH STREET BUILDING
SYNDICATE SUBSCRIPTION CORPORATION
NEW YORK CITY
OWNERS.

1944 All work shall be executed and materials furnished in accordance with this specification and the accompanying drawings prepared by

FRANK GRAD, Architect
521 FIFTH AVENUE
NEW YORK CITY.

May 31, 1929.
H. R. S.

SPECIFICATION SECTION 1945

FOR

SPECIAL CONDITIONS

1. GENERAL NOTE:

These "Special Conditions" together with the General Conditions of the Contract of the American Institute of Architects current edition, shall apply to the work as a whole and to each and all branches of the work. No arrangements or contracts with sub-contractors are to be such as to conflict with same. They shall also apply to any modifications or extra work. 1946

2. SCOPE OF WORK REQUIRED:

The general extent and scope of the work to be performed under this contract is described by the specifications and shown and noted upon the accompanying drawings and schedules which are to cover the general construction further supplemented by explanatory details, it being intended to include all labor and materials, and transportation, even though not especially shown or noted, but which are necessarily required to obtain the completed condition contemplated by the contract in accordance with the obvious intent and meaning of the drawings and specifications and schedules as interpreted by the Architect. 1947

The work shall be executed in accordance with the explanations and directions, and to the satisfaction of the Owner, the Architect and/or their representatives.

1948 3. INSPECTION OF PREMISES, BID & CONTRACT FORM:

All information given by the drawings or specifications in respect to the site or the existing premises is supposedly correct. Before submitting his bid, however, each bidder shall carefully examine the drawings and specifications and shall visit the site or the existing premises and shall fully inform himself as to all existing conditions and limitations. He shall include as a part of his work such work as may be required to meet these existing conditions and limitations,
1949 even though they are not shown on or referred to in or accurately or fully described by the drawings and specifications. No consideration will be granted for any alleged misunderstanding of the materials to be furnished or work to be done, it being understood that the tender of a proposal carries with it the agreement to all items and conditions referred to herein or indicated on the accompanying drawings.

The Owner reserves the right to reject any or all bids.

If the Owner elects to let any part or all of the work, contract shall be closed on a form satisfac-
1950 tory to the contracting parties.

4. LAYING OUT THE WORK:

The General Contractor shall lay out the general lines and levels of the work on all floors, and be responsible for their correctness, but each Subcontractor shall do whatever further laying out that may be necessary in connection with his work

and be responsible therefor, (any damage to the work or other trades inclusive), keeping a competent foreman on the ground. 1951

5. COOPERATION:

Any work necessary under any heading for any branch of the trades to make possible the work under any other heading must be done, though not specifically mentioned and full cooperation must be practiced by all contractors on the work.

6. DRAWINGS AND SPECIFICATIONS:

The drawings referred to in the specification consist of general working drawings, which will be supplemented by detailed drawings furnished as the work progresses. All drawings are intended to cooperate with and form part of the specifications. Where figures are given they are to be followed in preference to measurements by scale. Large scale and full size drawings shall be followed in preference to small scale drawings. 1952

In all cases the details and drawings shall be checked with existing conditions and from work in place, and variations, if any, be referred to the Architect for adjustment, as the Contractor will be held responsible for the fit of work in place.

When a profile or other finished condition is shown, furring or other provision necessary to obtain such finished conditions shall be provided. 1953

Anything referring to a particular trade and which is not expressly set forth, but which may be reasonably implied shall be furnished and performed, the same as though specifically shown and mentioned in both specifications and drawings, without extra cost to the OWNER.

1954 Should anything be omitted from the drawings or specifications which is necessary to a clear understanding of the work or should any error appear either in the various instruments furnished or in the work done by other contractors, which affects the work included in this specification, it shall be the duty of the contractor to notify the Architect. In the event of his failing to give such notice prior to the execution of any sub-contract he shall assume all responsibility for the proper execution of the work.

Each contractor will be furnished with two sets of drawings and one copy of specification. Ad-
1955 ditional copies will be furnished at the Contractor's expense.

7. Temporary Light & Power:

The General Contractor shall provide the general temporary lighting and current for the building. Each sub-contractor shall provide and pay for any necessary special temporary lighting or power requirements, and shall be responsible for any wastage of current for lighting or power purposes in connection with his work.

8. Temporary Heating:

1956 (a) The temporary heating arrangements will be furnished, installed and operated as provided in the Specifications for Heating.

No salamanders or stoves will be permitted in the building.

(b) The General Contractor shall arrange for the enclosure of all openings after the walls and

roof are in place, so as to permit the maintaining of a 50 degree temperature during plastering and 60 degrees thereafter, and see that such temperatures are maintained. 1957

9. Protection:

Full protection shall be provided for any and all adjacent buildings, roofs, skylights, vault lights, etc., or any other property liable to damage.

Each contractor shall repair any and all damage or injury to adjoining property caused by his work, and leave the property in as good condition as before the work started; shall relieve the Owner of all responsibility for any claims due to such damage or inquiry, defend any and all actions at law brought in connection with such claims, and pay any and all damages awarded against the Owner, and/or the General Contractor under such actions at law. 1958

10. Work Excluded:

The following features are not included in the building contract but will be furnished and installed by the lessee:

1. Kitchen Equipment.
2. Refrigerators for Main Kitchen, Pantries, etc. In this connection, however, there is to be included in this contract any and all masonry walls and partitions enclosing main kitchen refrigerators. 1959
3. Awnings and window shades.

1960

4. Kitchen shelving, etc., for hotel kitchens and food storage rooms in basement.

5. Wire screens or partitions in connection with hotel kitchens.

6. Closet Beds.

7. Metal clothes lockers.

8. Furniture, drapes, hangings, lamps, or floor covering such as linoleum, carpet, rugs, etc.

9. Electric light bulbs or meters for sub-metering except as required for temporary lighting during construction.

1961

10. The interior painting and decorating on plastered walls and ceilings of the following rooms:

Breakfast Room and Terrace
Entrance Lobby and Foyer and Vestibules.
Mens and Ladies Lounge.
Main Corridor
Elevator Lobby
Fountain and Writing Lounge
Main Dining Room and Terraces.
Palm and Tea Room and Terrace
Private Dining Rooms and Public Corri-

1962

dor to same.
Cosmetic Room Vestibule to same.

1963

PRELIMINARY

AND

MISCELLANEOUS WORK
SECTION

OF

SPECIFICATIONS

FOR

160-170 WEST 59TH STREET BUILDING
SYNDICATE SUBSCRIPTION CORPORATION
NEW YORK CITY
OWNERS.

1964

All work shall be executed and materials furnished in accordance with this specification and the accompanying drawings prepared by

FRANK GRAD, Architect
521 FIFTH AVENUE
NEW YORK CITY.

May 31, 1929.
H. R. S.

—

SPECIFICATION SECTION

1965

FOR

PRELIMINARY

AND

MISCELLANEOUS WORK

1. GENERAL CONDITIONS:

The General Conditions of the Contract of the American Institute of Architects current edition, together with the Special Conditions to which this

1966 Contractor is referred, shall form an integral part of this Contract.

For General Conditions and Special Conditions see copies on file in the Office of the Architect, and also on file in the Office of the Owner. Bidders and Contractors are requested to read these carefully and claims of ignorance of the provisions contained therein shall not be held to relieve them from the obligations therein imposed.

The Contractor will be required to comply with such General Conditions and Special Conditions (except as herein otherwise specified) the same as
1967 if they were bound in with this specification. He shall, therefore, consult same before preparing his bid and shall fulfill same in executing his work.

2. Notice to Bidders:

Before submitting his proposal, each bidder shall examine all drawings relating to this work and shall become fully informed as to the extent and character of the work required and its relation to other works in this building. No consideration will be granted for any alleged misunderstanding of the materials to be furnished or work to be done, it being understood that the tender of a
1968 proposal carries with it the agreement to all items and conditions referred to herein or indicated on the accompanying drawings.

3. Verifying Existing Conditions:

This Contractor, before commencing work, shall verify all governing dimensions at the building and shall examine all adjoining work on which his work is in any way dependent for its perfect efficiency according to the intent of this specification, and no "waiver of responsibility" for

defective adjoining work will be considered unless notice of same has been filed by this Contractor and acceded to in writing by the Architect, before the Contractor begins any part of the work. 1969

4. The General Contractor:

The General Contractor shall lay out the work and be responsible for its correctness. He must watch the progress of the work without notice from any one, and shall do his portion of it at the proper time for such work. He shall not delay any other contractor by neglecting to do his work at the proper time nor shall he do his work or any part of it before the proper time, and he must be responsible for any loss occasioned by such lack of knowledge as to the proper time, or by any work done either before or after such time. 1970

He shall be responsible and make good to the Architect's satisfaction all defacements and injuries to neighboring properties done by him or men in his employ, or through his or their negligence, or to any work upon the building not in his contract, if done by him or men in his employ, or through his or their negligence.

He shall use, provide for and make all proper, necessary and sufficient precautions, safeguards and protections against the occurrence or happening of any accidents, injuries, damages or hurt, to any person or property, during the progress of the construction of work contracted for, and he must be responsible for, and indemnify and save harmless the Owners from the payment of all sums of money by reason of any such accidents, injuries or hurts that may happen or occur through him or men in his employ, or through his or their negligence. 1971

1972 He shall provide for particular care of all finished work as the Building progresses and the same must be protected from injury or defacement during the erection and until completion of the building, unless otherwise specified.

He shall be responsible for all injuries or accidents to the work (no matter how same may occur), or to any part of the same, up to the time of final completion and acceptance by the Owners, and he must make same good to the satisfaction of the Architect.

1973 He shall give every facility for the erection or introduction of any work or materials not included in his contract. He shall not allow waste materials or rubbish to accumulate in any part of the building, but must arrange for prompt removal of same. He shall deliver the work in a perfect and undamaged state, clean in all ways suitable for occupancy or use.

The General Contractor shall check all shop drawings of Sub-contractors before submitting same to the Architect, and shall then submit them to Architect with his comments and recommendations.

1974 He shall give all notices, procure and pay for all surveys, permits, inspectors' fees, licenses, etc., directly or indirectly necessary. He shall obey all laws, ordinances and rules and be responsible for any failure to do so.

He shall make all work conform to the Rules and Regulations of the National Board of Fire Underwriters' State Laws and the Laws of the Bureau of Building Inspection and Bureau of Housing and Sanitation, and other authorities having jurisdiction.

1975

5. SIDEWALK BRIDGE AND FENCE:

The General Contractor shall provide and erect suitable and substantial sidewalk bridge, fence, etc. for the protection of the Public, storage of materials, etc.

Provide heavy plank platform above, for storing materials and protection to the public, with waterproof shed below covered with roofing material and properly sloped to drain.

Provide and maintain electric lighting under the bridge.

All to be painted two coats of selected color paint. 1976

The entire bridge shall conform to the regulations and requirements of the Bureau of Highways and other departments having jurisdiction.

6. TEMPORARY OFFICE:

The General Contractor shall, at the beginning of the work, erect where directed, a temporary office not less than 10′ x 24′, divided in two parts. The one part for the use of the Sub-contractors and the other for the superintendent. Offices shall be provided with doors, windows, waterproof roof, heat and electric light. Provide in each office one work table 7′ x 4′, also racks for holding drawings. 1977

The General Contractor shall have charge of the offices, pay for all heat and light used, take proper care of offices and supply the superintendent and Architect with keys to same.

The offices shall be painted two coats of selected color paint.

Upon completion of the work, the General Contractor shall remove the offices.

1978

7. TELEPHONE.

In Superintendent's or Contractor's Office, as directed, there shall be placed a city telephone; this telephone to remain until the full completion of the building, and to be paid for by the General Contractor.

8. VAULT PERMITS:

The General Contractor shall include in his estimate the cost of any necessary permits for the construction of the sidewalk vaults.

1979 9. WATCHMEN:

The General Contractor shall employ and retain one or more competent watchmen on the premises at night and all times including Sunday and Holidays, until the entire operation is completed and until the Owner has taken charge of the building.

10. MAINTAINING SERVICES:

The General Contractor shall support and maintain in place and in operation all light poles, hydrants, piers, conduits, and other services on
1980 or under streets, and shall restore all such services if damaged.

11. STREET REPAIRS:

The General Contractor shall arrange for all repairs to street and adjoining sidewalks, made necessary by this work.

12. STREET GUTTERS:

All street gutters shall be kept free from and clear of any obstructions during the entire operation.

1981

13. TEMPORARY WATER & SEWER CONNECTIONS:

The Plumbing Contractor shall make or arrange for all necessary temporary water and sewer connections, and provide temporary toilet facilities, all as provided for in the Specifications for Plumbing, but the General Contractor shall furnish and install temporary enclosures for such toilet conveniences.

14. PUMPING & DRAINING:

The General Contractor shall do all pumping of surface or subsurface water, and draining of the property, other than is provided for under the Specification for Excavation. 1982

15. SCAFFOLDING, RUNWAYS, ETC:

All scaffolding required for the work of the various trades will be furnished and installed as specified under the Specification Section for the various trades, but this Contractor shall furnish and install all scaffolding required for any and all work included in the work of this contract, as herein specified.

No claims of additional costs of scaffolding, due to delay in delivery of steel, will be allowed.

This Contractor shall furnish, install and maintain, all general runways, rubbish chutes, temporary stairs, ladders, temporary or permanent hatch protection, etc., that may be required by the nature of the work. 1983

All runways, etc., hereinabove specified shall be altered, removed and rebuilt whenever required by the nature of the work, or as required.

16. CASH ALLOWANCES:

The General Contractor shall include in his estimate the following cash allowances for the features enumerated.

1984	Finishing Hardware F.O.B. building	$50,000.00
	Lighting Fixtures, installed, connected and including all inspection fees	50,000.00
	Medicine Cabinets F.O.B. building	10,000.00
	Serving Pantry Cabinets, installed	20,000.00
	Apartment Refrigerators, installed	70,000.00
	Tile Fountain in Fountain Lounge, installed	1,000.00
	Fireplaces, 18th to 38th floors, inclusive, cash	150.00
	Fireplaces, 39th and 40th floors, inclusive, cash	250.00

1985 Allowances for fireplaces are to cover hearths, facings, fireplace linings, mantels and shelves, installed complete.

PLAIN PAINTING
SECTION
OF
SPECIFICATIONS
FOR
160-170 WEST 59TH STREET BUILDING
SYNDICATE SUBSCRIPTION CORPORATION
1986 NEW YORK CITY
OWNERS

All work shall be executed and materials furnished in accordance with this specification and the accompanying drawings prepared by

FRANK GRAD, Architect
521 FIFTH AVENUE
NEW YORK CITY.

May 31, 1929.
H. R. S.

SPECIFICATION SECTION 1987

FOR

PLAIN PAINTING

1. GENERAL CONDITIONS:

The General Conditions of the Contract of the American Institute of Architects current edition, together with the Special Conditions to which this Contractor is referred, shall form an integral part of this Contract.

For General Conditions and Special Conditions see copies on file in the Office of the Architect, and also on file in the Office of the Owner. Bidders 1988
and Contractors are requested to read these carefully and claims of ignorance of the provisions contained therein will not be held to relieve them from the obligations therein imposed.

The Contractor will be required to comply with such General Conditions and Special Conditions (except as herein otherwise specified) the same as if they were bound in with this specification. He shall, therefore, consult same before preparing his bid and shall fulfill same in executing his work.

2. NOTICE TO BIDDERS:

1989

Before submitting his proposal, each bidder shall examine all drawings relating to this work and shall become fully informed as to the extent and character of the work required and its relation to other works in this building. No consideration will be granted for any alleged misunderstanding of the materials to be furnished or work to be done, it being understood that the tender of

1990 a proposal carries with it the agreement to all items and conditions referred to herein or indicated on the accompanying drawings.

3. Verifying Existing Conditions:

This Contractor, before commencing work shall verify all governing dimensions at the building and shall examine all adjoining work on which his work is in any way dependent for its perfect efficiency according to the intent of this specification, and no "waiver of responsibility" for defective adjoining work will be considered unless notice of same has been filed by this Contractor and acceded
1991 to in writing by the Architect, before the Contractor begins any part of the work.

4. Scope of Work:

There shall be included in the work of this contract the furnishing of all labor and material required for the installation complete of all plain painting, priming of carpentry and millwork, puttying, sandpapering, etc., and all work necessary for the execution of plain painting as shown on the drawings and schedule sheet and as hereinafter specified.

Work Not Included—There shall not be in-
1992 cluded in the work of this contract the painting or finishing of any cabinet work (see specification for Cabinet Work) or the painting of any piping included in the work of the Mechanical Trades, or the decorating of certain rooms enumerated in Article #10 of "Special Conditions".

All radiators will be delivered to the building and installed with a priming coat. This Contrac-

tor shall do finished painting of all radiators as hereinafter specified. 1993

5. Cooperation with Other Contractors:

This Contractor shall cooperate with all other contractors engaged in work on the building to the end that proper unity of action will facilitate the orderly progress of the work.

Shop drawings and other data that may be prepared by or for this Contractor for use in the installation of his work shall be given to those contractors who require the information contained therein.

6. Quality of Workmanship: 1994

All work which is to be performed under this contract shall be done by mechanics skilled in their respective trades in order to produce first class construction and installation of the work.

Mediocre workmanship will not be acceptable to the Architect.

7. Materials:

Pure White lead and pure linseed oil shall form the basis of all paint, unless otherwise specified.

All materials, as far as practicable, shall be delivered to the building in original containers and 1995 opened on the premises.

When once opened, said materials shall be stored in proper places and be protected from dust, water and other foreign matter and from all harmful influences likely to impair their qualities or usefulness.

1996 All faulty, damaged or condemned materials shall be promptly removed from the premises, whether under approved labels or not.

All shall be the product of the Arco Company, Lowe Bros., Sherwin Williams Company, Dupont, or Helton L. McCann Company, or equal as approved or selected by the Architect.

8. STORAGE:

This Contractor shall store all of his materials in one place, designated by the Superintendent, shall keep same neat and clean and repair all damage to surroundings.

1997 This Contractor shall exercise due care in the storage of paint, oil, rags, etc., to prevent danger of fire.

9. COLORS:

The colors for all finishing coats of paint shall be selected by the Architect. Each of the under coats shall be of slightly different shade from the preceding one.

10. NOTE:

The priming of the various parts and surfaces, is for the most part distributed throughout this
1998 specification and need not be repeated in fulfillment of the work described under this part.

This contractor shall refer to Plastering, carpentry and Millwork, Ornamental and Miscellaneous Iron Work, Tile and Marble work for height of wainscot. Kalemeined work and Metal Bucks, and Mechanical work for pipes and radiators for

interior finish and piping and radiators, and plastering requiring Painting and Finishing. 1999

Any work not included, must be so stated by this Contractor.

11. WORKMANSHIP: All workmanship shall be performed and executed in a neat, careful and painstaking manner, by skilled workmen acting under competent direction.

The Architects shall have arbitrary power of direction over the work to be done under these specifications. All work to be applied so as to show no brush marks or laps.

12. PREPARATION: 2000

All surfaces shall be cleaned down, dusted, puttied, cracks filled, defects removed, sandpapered and otherwise prepared and treated and made ready for receiving and assuring first-class results in finish and workmanship.

All knots and sappy places shall be shellaced with one or more coats of pure alcohol shellac, as required and properly sandpapered.

Corrosion, scale and dust must be removed from all metal surfaces before painting.

13. SPATTERING: 2001

The Contractor shall avoid spattering of glass, wood work, walls, floors, fixtures, apparatus, etc., with paint and finishing materials, and if any such spattering occurs, he shall at once thoroughly remove all evidences of the same, and shall repaint and finish any patched surfaces. This is to be done at his own expense and cost as soon as it appears.

2002 14. NUMBER OF COATS:

The number of coats of application of paint and of finishing materials specified, is sufficient to produce a first-class finish, when properly applied under normal conditions of surfaces, etc. However, if because of defects in said conditions, more coats are required, then this Contractor shall supply and apply whatever additional coats that may be required to accomplish a first-class piece of work, that is satisfactory to the Architects.

15. PRIMING:

2003 All parts of millwork to be primed by this Contractor, including parts not exposed to view. *Number of coats hereinafter specified, does not include the priming coat.*

All metal work, including Kalameined doors, etc., and as specified under various headings, will be primed by the Contractor furnishing that work.

16. INTERIOR WOOD WORK:

All finish in connection with cabinet work on the first floor will be done by the Contractor for the cabinet work. This Contractor shall not in-
2004 clude any finish in connection therewith. All other wood work except wood floors shall be painted or otherwise finished by this Contractor. All interior wood windows in the basement shall be painted three coats of lead and oil paint, in colors selected. All other wood doors, interior sash and all interior wood trim, such as wood base, picture moulding, etc., throughout the rest of the building shall be finished with one coat of pure thin alcohol shellac, one coat of flat enamel under coater and one coat of semi-gloss long oil enamel,

all in selected colors. Note that only the front edges of closet shelving are to be painted, the top and bottom of such shelving to be left unpainted. Applied mouldings in apartments, wherever same are indicated on the plans shall be finished with the walls. 2005

Wood hand rail on stairs, where same occurs, shall be filled and given one coat of thin alcohol shellac, three coats of rubbing varnish and rubbed with pumice and oil to a dull gloss.

17. Interior Metal Work:

All kalamein doors and metal bucks exposed in the kitchen and the basement, shall be finished with two coats of flat enamel under coater and one coat of long oil gloss enamel. All other kalamein doors and metal bucks in the basement to receive two coats of lead and oil paint in color selected. 2006

All other kalamein doors throughout building, including doors of Freight and Service Elevators to be painted with two coats of lead and oil paint in selected colors.

All metal bucks and trim throughout the building except elevator fronts on the first floor shall be finished with two coats of flat enamel under coater and one coat of semi-gloss long oil enamel, tinted as directed. 2007

All metal access doors shall be painted out with the walls.

All risers, treads, horses, wall skirting, underside of risers, treads and platforms, etc., in connection with pressteel stairs shall receive two coats of satin black paint. All stair rails and standards in connection with same to be painted with two coats of satin black paint.

All heat grilles, vent grilles, etc., to be painted or otherwise finished to match the work in which the grilles occur.

2008 Ornamental iron railings to receive three coats of lead and oil paint in selected colors.

All radiators throughout the building to receive two coats of selected metallic paint in selected colors.

All door checks to be finished to match the work upon which same occur.

All tin clad doors to be painted three coats of lead and oil paint ~~in~~ colors selected.

18. WALL AND CEILING PAINTING:

This Contractor shall *not* include any painting or decorating in connection with any plastered
2009 walls or ceiling surfaces in the following spaces:

Breakfast Room and Terrace
Fountain and Writing Lounge.
Entrance Lobby and Foyer and Vestibules.
Main Dining Room
Mens and Ladies Lounge.
Main Corridor
Elevator Lobby
Palm and Tea Dining Rooms and Public Corridor to same
Cosmetic Room, Vestibule to same.

Walls and ceilings in unasigned space, Steam
2010 Room, Incinerator Room, Transformer Vault, Refrigeration Room, and Elevator Pits in basement, also shops and fan room on first floor, Plenum Chamber and penthouse will *not* be painted.

The walls of the following spaces in the basement shall receive two coats of mill white, Receiving Room, Laundry, Paint Shop, Electricians Room, Carpenter Shop, Plumbers Shop, Valet Shop, and Telephone Terminal Room.

The Following rooms in the basement shall receive two coats of Maxwell's Cold Water paint,

Mechanical Equipment Room, Pump Room, Meter Room, Fan Room, Trunk Room, and Furniture Room. 2011

Gloss Finish—All Bath Rooms, Apartment Kitchens, Barber Shop, first floor Pantries, Service Corridors and Toilet Rooms, shall be finished with one coat of primer, two coats of flat enamel under coater and one coat of long oil gloss enamel.

All walls and ceilings in the basement kitchen and adjacent storage rooms, basement corridors, and first floor pantry, dish washing, shall also be finished with gloss enamel. This work shall be applied on *plaster, concrete, brick* and *hollow tile.*

Elevator Hatchways—The inside of all elevator hatchways shall be painted two coats of black masonry paint applied directly on the hollow tile block. 2012

Cement Base—Cement base in public corridors to be painted three coats of approved "cement paint" gloss finish, selected color.

Other walls and ceiling—All other walls and ceilings throughout, except as hereinotherwise specified to the contrary, shall be finished with one coat of flat wall primer and two coats of flat wall paint all to be lithophone base paint. The last coat in all Living Rooms, Bed Rooms, Foyers, and Public Corridors to be stippled. In all service corridors and service spaces from the first floor up inclusive there shall be a dark Dado 4′ 6″ high. 2013

19. NUMBERS:

Paint numbers of all floors at all door openings in all elevator hatchways, firetower and stairway.

Number shall be 6″ high.

Paint numbers on corridor doors to all suites and bed rooms, 2-¼″ high.

Specifications—Plain Painting

2014 All number in connection with passenger elevators only, shall be executed in gold leaf with colored liner.

All other numbers shall be executed, without liner.

20. GENERAL:

In all special cases that are not sufficiently covered and described in this specification, this contractor shall follow the special directions of the Architects, as to the application, colors, etc., required.

This specification shall include all painting and
2015 finishing throughout, except as hereinbefore specified to the contrary. All shades and colors shall be selected by the Architects and finished samples of all work must be submitted for their approval, before commencing the work.

Plaintiff's Exhibit 5, set of plans of building marked

Plans Approved
The Prudence Co., Inc.
P. J. Collins
2016 Date 6/14/29

and "These plans were used at the time of closing of Loan @ N. Y. office, compared with set approved by Bldg. Dept.—OK WGW" is omitted from the printed record pursuant to stipulation and order (*supra*, p. 565) subject to the right of either party to submit the same to the Court if so advised.

Plaintiff's Exhibit 6.

Sept 24-1929 2017

AMENDMENTS REQUIRED BY THE PRUDENCE COMPANY, INC., IN SPECIFICATIONS SUBMITTED BY FRANK GRAD, ARCHITECT, COVERING BUILDING TO BE ERECTED BY CENTRAL PARK PROPERTIES, INC., CENTRAL PARK SOUTH 100′ EAST OF SEVENTH AVENUE

Above specifications are approved as amended herein.

PRUDENCE CO. INC
by M BIGELOW
Asst Secy

STONE: 2018

Indiana limestone required. Drip cuts shall be provided in all projecting stone courses.

FLOORS AND DOOR SADDLES:

All corridor door saddles shall be of marble or terrazzo. Base and border of all corridors shall be marble, terrazzo or fireproof wood. Floors in all rooms shall be laid with blind joints.

Corridor base & border of cement if properly finished will be accepted.

MASONRY:

Around columns standard 2″ or 4″ column covering hollow tile shall be used. In elevator shafts smooth faced hollow tile partition block painted shall be used wherever walls are visible from elevator cars. 2019

PLASTER:

Patent plaster shall be used on all walls. Lime plaster will not be accepted.

Lath shall be Armco, Toncan, Truscan or equal, and any make other than those mentioned shall be subject to our approval.

2020 On ground floor lath used shall be Armco or Toncan.

HEATING:

All radiators shall be enclosed hung wall type of a make to be approved by us, shall be "Phantom" or equal

BOILER STACK:

Provision shall be made in and around location for boiler room for tops of column footings being brought down to a sufficient depth below the general floor level to accommodate boiler returns, etc.

2021 SOUND-PROOFING:

All partitions between apartments shall be sound-proofed.

PAINTING:

All painting and decorating shall be completed.

M. B.
L. H.

PLUMBING:

Make and type of all bath room fixtures shall be subject to our approval and bath tubs shall be
2022 5'6" where space permits, and in no case less than 5', excepting in servants' rooms, where same may be 4'6". Maddon or Standard or equal.

LEADERS AND VENTS:

Shall be galvanized wrought iron.

TILE:

Height of tile wainscoting on walls of bath rooms shall be at least 4'6" and around tubs 6' from floor.

Amendments to Specifications

REFRIGERATION:

Electric or gas refrigerators shall be installed in all serving pantries.

ELEVATORS:

~~Micro leveling elevators required.~~
Elevator doors on first floor shall be bronze.

VENTILATION:

All vent ducts shall be Armco, Toncan or Truscan or equal, and if any other make than those specified is used, same shall be subject to our approval.

SPECIAL ITEMS:

All mechanical and other equipment necessary to the operation of a building of this type, not including however hotel furniture and furnishings, shall be installed.

Where wood doors, saddles, cabinet work, etc. are specified, same shall be fireproof wood or kalamine to comply with the Building Code.

BRICK:

Samples of stone and brick shall be submitted for our approval.

M. B.
L. H.

Plaintiff's Exhibit 7, copy of letter from The Prudence Company to Central Park Properties, Inc., dated September 13, 1929, requesting financial statement in specified form, is omitted from the printed record, pursuant to stipulation and order (*supra*, p. 565) subject to the right of either party to submit the same to the Court if so advised.

Plaintiff's Exhibit 8.

2026 THE PRUDENCE COMPANY, INC. [MEMORANDUM]

To Mr. Johnston: From Mr. Bigelow:

Date Sept. 17, 1929

RE: Central Park Properties, Inc.—loan $6,650,000.—

I hand you herewith financial statement of A. E. Lefcourt which is approved.

M. B.

[LETTERHEAD OF A. E. LEFCOURT REALTY HOLDINGS.]

2027 September 13th, 1929.

Mr. Arthur H. Waterman,
c/o Prudence Co. Inc.,
331 Madison Avenue,
New York City.

Dear Mr. Waterman:—

In compliance with your request, I am herewith enclosing corrected financial statement as of August 31st, which now includes the net equities of the Lefcourt-National Building at Fifth Avenue & 43rd Street,—the Lefcourt-Clothing Center at
2028 Seventh Ave. 25th to 26th Streets, and the Lefcourt-Normandie Building at Broadway and 38th Street.

As per your request, I have also given you the contingent liability of notes still outstanding to the contractors on the three buildings mentioned above.

With thanks for all your co-operation in the past, I remain

Yours very truly,

A E LEFCOURT

AEL:L

Plaintiff's Exhibit 8

[Letterhead of A. E. Lefcourt Realty Holdings.]

2029

Confidential

Statement of A. E. Lefcourt Personal Holdings as of August 31, 1929

160,861 shares of Lefcourt Realty Common (Market value $4,021,525.00)	$3,000,000.
14,991 shares of Lefcourt Realty Preferred (Market value $494,967.00)	350,000.
2,000 shares of Lefcourt National Bank & Trust Co. (Market value $700,000.00)	500,000.
Cash in bank as of August 31st, 1929	133,495.65
Cash net equity building Fifth Ave. & 43rd St.,	2,300,000.
Cash net equity building Broadway & 38th St.,	800,000.
Cash net equity building Seventh Ave. 25th to 26th Sts.	1,000,000.
	8,083,495.65

2030

Bank Loans, A. E. Lefcourt—None

2031

Contingent Liability

A. E. Lefcourt endorsement on contractors notes Building Fifth Ave. & 43rd St.,	379,062.50
A. E. Lefcourt endorsement on contractors notes Building Seventh Ave. 25th to 26th Sts.,	179,062.50
A. E. Lefcourt endorsement on contractors notes Building Broadway & 38th St.,	115,972.50

A. E. Lefcourt

Plaintiff's Exhibit 9, copy of letter from The Prudence Company, Inc., to A. E. Lefcourt, dated
2032 September 14, 1929, is omitted from the printed record, pursuant to stipulation and order (*supra*, p. 565) subject to the right of either party to submit the same to the Court if so advised.

Plaintiff's Exhibit 10.

Pr. Guarantee B. L. A., etc. (5/27)—No. 240.

GUARANTEE ON LOAN TO CENTRAL PARK PROPERTIES, INC.,

In consideration of and to induce THE PRUDENCE
2033 COMPANY, INC., a New York corporation, as lender, to enter into a certain agreement for a building loan with CENTRAL PARK PROPERTIES, INC., a New York corporation, having its principal office at No. 1359 Broadway, Borough of Manhattan, New York City, as borrower, to be of even date and simultaneously executed and delivered herewith, such loan being in principal amount SIX MILLION SIX HUNDRED & FIFTY THOUSAND Dollars and to be secured by bond and first mortgage on premises located ~~at~~ on the north side of West 58th Street and the south side of West 59th Street, 100 feet east of 7th Avenue, in the Borough of Manhattan,
2034 New York City, ~~we,~~ I, ABRAHAM E. LEFCOURT, the undersigned, ~~individually, jointly and severally~~ guarantee to THE PRUDENCE COMPANY, INC., said lender, its successors and assigns, that CENTRAL PARK PROPERTIES, INC., said borrower, will continuously proceed with, construct and complete the building and improvements described in said building loan agreement in strict accordance with the terms thereof and with the plans and specifications therefor (after approval by lender), and that said borrower will furnish and install all

equipment ~~and furnishings~~ required under said agreement, plans and specifications, so that such building and improvements with equipment ~~and furnishings~~ will be fully completed and ready for occupancy and use within the time specified in said agreement, free and clear of all municipal violations, mechanics' or materialmen's liens or other liens or claims for work, labor, services, materials, machinery, fixtures or equipment furnished or installed in or about said building and improvements, and that said borrower will fully comply with all laws, rules, ordinances, regulations and requirements of the City and State of New York, , or any governmental department, officer or agent, applicable to the construction, completion, occupancy or use of said building and improvements with equipment ~~and furnishings~~ therein contained, and the undersigned further ~~individually, jointly and severally~~ guarantees that said borrower will keep and perform all the other terms and conditions of said agreement on its part to be performed and will make all the payments on its part required to be made under said agreement together with payment of principal and interest on the bond and mortgage mentioned in said agreement until completion of said building as aforesaid, and the undersigned likewise agree to forthwith make good any default of said borrower under said building loan agreement, bond or mortgage. 2035 2036 2037

And the undersigned further guarantees the prompt removal of any municipal violations and the prompt cancellation and/or discharge of record of any liens, and hereby indemnify and save harmless the lender from and against any loss or damage by reason of delay in completion of the building beyond the completion date fixed in said

agreement, and from and against any and all claims, costs, suits, judgments, counsel fees or other damages incurred or suffered by said lender in making good any default by said borrower or in performing or discharging any of the covenants or conditions of said agreement, and the undersigned ~~individually, jointly and severally~~ agree on demand to repay to lender with interest, any sums advanced or paid by lender in order to make good any such default by said borrower.

Said building loan agreement and/or plans and specifications are made a part hereof as if fully set forth herein and may be altered or modified without procuring the consent or approval of the undersigned and without releasing the undersigned from any liability hereunder, except that the principal amount of the mortgage mentioned in said agreement shall not be increased without the consent of the undersigned.

Any waiver or release by said lender of said borrower from performance of any of the provisions of said agreement or from compliance with any part of said plans and specifications, shall not release the undersigned except as to a default with respect to the item so waived or released by said lender. The undersigned hereby waive any and all notice of any default by the borrower under the terms of said building loan agreement.

And the undersigned, further guarantees to said lender, its successors and assigns, the punctual payment of the full principal sum and interest of the bond and mortgage above described and all amounts advanced and to be advanced thereon and of any extension agreement thereof, as said principal and interest become due thereunder,

and the faithful performance by the mortgagor of all the terms and conditions thereof; ~~and upon~~

~~delivery of the bond and mortgage, the undersigned, if requested by lender, will execute and deliver to lender a separate guarantee thereof on lender's usual form, but such guarantee shall not affect any of the remaining provisions of this instrument.~~ Lender shall give the undersigned ten days' advance notice in writing upon demanding payment from undersigned under this paragraph. 2041

Anything contained herein to the contrary notwithstanding, the obligation of the undersigned under this guarantee shall cease and this guarantee shall become null and void when the Municipal and/or State Departments having jurisdiction have issued the customary certificates of occupancy. 2042

Said lender may institute any action or pursue any remedy against the undersigned under this instrument immediately after default by said borrower in performing any provision of said agreement and/or in complying with such plans and specifications and/or in making payments required by such bond and mortgage or in performing the other terms thereof.

The terms "bond and mortgage" or similar words in each case where used herein, shall be construed to include the bond or bonds and mortgage or mortgages and any spreading, consolidation and/or extension agreement of two or more bonds and mortgages, which evidence the above mortgage indebtedness and security. 2043

The mailing of a demand in a sealed, post-paid envelope addressed to the undersigned at his ~~or her~~ address given below, by depositing it in any post-office, post-office station or letter box in the City of New York, shall be a sufficient demand hereunder.

Collateral Bond of A. E. Lefcourt

2044 This instrument shall inure to the benefit of The Prudence Company, Inc., its successors and assigns, and each and every holder of the bond and mortgage above mentioned, and shall bind the undersigned, ~~—h—~~ my heirs, executors, administrators and assigns.

WITNESS, hand and seal this 25th day of September, 1929.

A. E. LEFCOURT [L. S.]
Residing at Savoy Plaza

..... [L. S.]
2045 Residing at

..... [L. S.]
Residing at

STATE OF NEW YORK }
COUNTY OF NEW YORK } SS.:

On the 25th day of September, 1929, before me came ABRAHAM E. LEFCOURT, to me known to be the individual described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.

ALEXANDER JOHNSTON
2046 ALEXANDER JOHNSTON
Notary Public, Kings County
Kings Co. Clerk's No. 93; Reg. No. 198
N. Y. Co. Clerk's No. 252; Reg. No. 0-170
Bronx Co. Clerk's No. 17; Reg. No. 3045
Queens Co. Clerk's No. 1517; Reg. No. 4341
Commission expires March 30, 1930

Plaintiff's Exhibit 11.

[Letterhead of A. E. Lefcourt Realty Holdings.]

2047

January 2nd, 1930.

Prudence Company, Inc.,
331 Madison Avenue,
New York City.

Gentlemen:—

Attention of Mr. Wm. G. Walters

Re:—Central Park Properties
58th-59th Streets

2048

We wish to confirm herewith the visit your Mr. Walters paid our office last Tuesday, at which time he approved materials which we intend to use on the above mentioned job as follows:—

1. Sample of Limestone furnished by James McLaren & Sons, initialled and signed by your Mr. Walters.

2. Sample of Granite furnished by James McLaren & Sons, initialled and signed by your Mr. Walters.

3. Face Brick known as Darlington SK-5, Clear Selected, as furnished by Continental-Fiske, Inc., duly initialled and signed by your Mr. Walters.

2049

4. Court Brick known as Special Mingle Speckled Courts, duly initialled and signed by your Mr. Walters.

Plaintiff's Exhibit 11

2050 We have accordingly contracted to use these materials, and the samples which your Mr. Walters duly initialled will be kept at this office.

Awaiting your confirmation, we remain

Yours very truly,

CENTRAL PARK PROPERTIES, INC.
By L. HAAS
Secretary.

LH:EB
(CC Grad-Lush-Klein)

2051 **Plaintiff's Exhibit 12.**

January 6th, 1930

Central Park Properties, Inc.,
1359 Broadway,
New York, N. Y.

Att: Mr. Louis Haas, Secretary

Re: Central Park Properties, Inc.
58th-59th Street.

Gentlemen:

2052 The samples of face and court brick, together with the limestone and granite which I recently initialed and approved at your office, has this day been approved by the committee.

Very truly yours,

THE PRUDENCE COMPANY, INC.
By W. G. Walters, Ch. Eng.
ENGINEERING & INSPECTION DEPT.

WGW:FG

Plaintiff's Exhibit 13.

2053

January 7th, 1930

Central Park Properties, Inc.,
1359 Broadway,
New York, N. Y.

Att: Mr. Louis Haas, Secretary

Re: Central Park Properties
58th-59th Sts.

Gentlemen:

Regarding our conversation as to the omission of a rubbish chute in the final plans covering the above operation.

2054

This item has been given careful consideration, and we are pleased to state that the committee and in accordance with your opinion that a rubbish chute in this particular building would not be necessary.

Very truly yours,

THE PRUDENCE COMPANY, INC.
By W. G. Walters, Ch. Eng.
ENGINEERING & INSPECTION DEPT.

WGW:FG

2055

Plaintiff's Exhibit 14.

2056

cc: Mr. Walters, Engr. Dept.

January 21, 1930

Mr. Louis Haas, Secy.
Central Park Properties, Inc.
1359 Broadway
New York, N. Y.

Dear Sir:

Before giving our written approval of the plans of the Hotel Building you are erecting on the south side of Central Park West, 100′ east of
2057 Seventh Avenue, New York, there is one other item about the plans, which we wish to clear up.

We feel that the flooring in all the bedrooms and living rooms should be of 7/8ths inch hard wood, and that the plans should be amended to provide for this.

We trust that this will be satisfactory to you and that you will instruct Mr. Frank Grad accordingly.

Very truly yours,

Vice President.

GSB.R

2058

Plaintiff's Exhibit 15.

2059

[Letterhead of A. E. Lefcourt Realty Holdings.]

January 23rd, 1930

The Prudence Company,
162 Remsen Street,
Brooklyn, New York.

Attention of Mr. G. S. Braislin

Re: Central Park Properties
58th-59th Streets

Gentlemen:

2060

We are in receipt of your favor of the 21st instant, contents of which we do not quite understand owing to the fact that the question of cement floors was always intended to be installed on the above mentioned building, and you also state that "before giving our written approval of the plans" you ask that wood floors be replaced in place of the cement floors.

We wish to notify you that we already have your signed and stamped approval on the plans which we submitted to you and which show that cement floors were to be installed, and furthermore, if you will refer to the various conferences 2061
had with your Company, at which your Mr. W. Bigelow was always present, you will find this to be a fact.

Plaintiff's Exhibit 15

2062 Also at the time that the specifications were gone over with your Mr. Bigelow, if you will refer to the final accepted specification as approved by your Company on September 24th, 1929, you will find in the second paragraph of your specification under the heading "Floors and Door Saddles" that in this paragraph it is distinctly mentioned that "floors in all room shall be laid with blind joints". This certainly refers to and means cement finished floors.

Based upon your approval as outlined above, we awarded the contract for this work quite some time ago.

2063 It never was our intention to finish these floors in any other manner, and we can refer you to several other buildings of similar kind that also have used and installed cement finished floors.

Trusting this explanation will be entirely satisfactory to you, as we do not feel we should be called upon to make this change, we are

Yours very truly,

CENTRAL PARK PROPERTIES, INC.
By L HAAS
Secretary.

LH:EB

2064

Plaintiff's Exhibit 16.

2065

[Letterhead of A. E. Lefcourt Realty Holdings.]

January 24th, 1930.

Prudence Company,
162 Remsen Ave.,
Brooklyn, New York.

Attention of Mr. W. G. Walters

Re:—Central Park Properties
58th-59th Streets

Gentlemen:—

Confirming conference had on the 22nd instant 2066
on various matters pertaining to the construction of the above mentioned building, we would respectfully ask your permission, allowing us the use of Commercial Galvanized Wrought Pipe for soils, wastes, leaders and vents throughout the building.

None of these features as you well know, are subjected to any pressure, neither are any of them exposed to as severe moisture and atmospheric conditions as the pipes of the heating system (in which you have permitted us to use commercial black iron pipe) and in addition, the soil and waste pipes generally accumulate a surface deposit 2067
which effectively protects them from attack on the inside.

(Pencil note: but reduces the area clog.)

Plaintiff's Exhibit 16

Mr. Edward A. Kingsley, our Mechanical Engineer on this building, as well as other mechanical engineers who we professionally engaged on previous operations, feel very strongly that it would be a needless waste of money to use anything other than Commercial Galvanized Wrought Pipe for these features, and we are quite confident that you will approve of its use. We are also sure that if you will examine the enclosed list of buildings in which this material has been used successfully, that you will agree with us that it should be satisfactory for use on the above mentioned building.

Trusting that we may receive a favorable reply from you, as we are about ready to award the contract for this work, and thanking you in advance, we are

Yours very truly,

CENTRAL PARK PROPERTIES, INC.
By: L. HAAS
Secretary.

LH:EB
(CC Kingsley—
Grad-Lush-Klein)

(Pencil notes in margin: "This has been O. K. by committee of 1/24/29—W. G. W. Appr. for copper bearing steel pipe O. K. W. G. W.")

Plaintiff's Exhibit 17.

2071

[Letterhead of A. E. Lefcourt Realty Holdings.]

January 24th, 1930.

Prudence Company,
162 Remsen Ave.,
Brooklyn, New York.

Attention of Mr. W. G. Walters

Re:—Central Park Properties
58th-59th Streets

Gentlemen:—

2072

Confirming conversation had with you at the conference you attended in our office when we discussed the plumbing work to be done at the above mentioned building, we are enclosing herewith two folders of Thomas Maddock's Sons Pottery, showing the various fixtures we propose using on the above mentioned building, which are in confirmation of the discussion we had with you and which we were informed would receive your approval authorizing us to proceed.

Will you kindly approve one copy and return same to us, retaining one copy for your files.

Thanking you for your prompt reply, we remain 2073

Yours very truly,

Central Park Properties, Inc.
By: L. Haas
Secretary.

LH:EB
(CC Kingsley—
Grad-Lush-Klein)

Plaintiff's Exhibit 18.

2074

January 28, 1930

Central Park Properties, Inc.,
1359 Broadway,
New York, N. Y.

Att:—Mr. Louis Haas, Secretary.

Re:—Central Park So. S/S running
fr. W. 58th St. N.Y.C.

Gentlemen:—

We herewith acknowledge receipt of your letter of the 24th inst., and have considered your re-
2075 quest mentioned therein.

It was my opinion at this conference that a galvanized copper steel pipe is to be used instead of a wrought iron pipe, which we originally specified.

In view of the fact that the savings incurred can be used to a better advantage, such as higher grade plumbing fixtures, fittings, etc., we are hereby approving the change as requested.

Respectfully yours,

THE PRUDENCE COMPANY, INC.
By—W. G. Walters, Ch. Eng.
2076 ENGINEERING & INSPECTION DEPT.

WGW:FG

Plaintiff's Exhibit 19.

2077

January 31st, 1930

Central Park Properties, Inc.,
1359 Broadway,
New York, N. Y.

Att:—Mr. Louis Haas, Secretary

Re:—Central Park South, S/S to
W. 58th St. 100' E. 7th Av.

Gentlemen:—

Attached herewith please find folder which you submitted for our approval.

You will note therein that all of the fixtures 2078
except the showers have been approved.

In reference to the showers, we will require that a mixing valve be incorporated therein. I am however, leaving this question open for later discussion, which is in accordance with our recent telephone conversation.

I sincerely regret witholding this approval for the past two days, and beg to remain

Respectfully yours,

THE PRUDENCE COMPANY, INC.
By—

2079

(Signed)—W. G. Walters, Ch.Eng.
ENGINEERING & INSPECTION DEPT.

WGW:FG

Plaintiff's Exhibit 20.

2080

February 4th, 1930

Central Park Properties, Inc.,
1359 Broadway,
New York, N. Y.

Att: Mr. Louis Haas, Secretary

Re: Central Park So. S/S running thru. to W. 58th St. N. Y. C.

Gentlemen:

We take this opportunity to acknowledge receipt of your letter of the 3rd inst.

2081

Your request as mentioned therein is agreeable to us on the conditions as you set forth in the above mentioned letter.

Respectfully yours,

THE PRUDENCE COMPANY, INC.
By W. G. Walters, Ch. Eng.
ENGINEERING & INSPECTION DEPT.

WGW:FG

2082

Plaintiff's Exhibit 21.

[Letterhead of A. E. Lefcourt Realty Holdings.] 2083

February 3rd, 1930.

The Prudence Company, Inc.,
162 Remsen Street,
Brooklyn, New York.

Attention of Mr. W. G. Walters

Re: Central Park Properties—58th-59th Sts.

Gentlemen:

We thank you for your favor of the 31st ultimo, returning to us the folder containing the plumbing fixtures we intend to install at the above mentioned building. 2084

We note in your letter the exception you take to the showers, wherein you suggest that you will require a mixing valve on the showers.

May we in this respect, ask that for the time being, you omit this exception for the reason that we have gone into the question of the mixing valve very thoroughly and find that it is the universal opinion in the majority of cases, of some very learned and experienced engineers, that the ordinary hot and cold water faucets on the showers 2085 are much more practical than the mixing valve for the reason that the mixing valve is not practical in any way whatsoever.

You might be aware of a recent law-suit that occurred against one of the prominent hotels of this city, wherein a guest of the hotel secured a judgment of $160,000. against this hotel on account of the guest being scalded by hot water through the mixing valve not operating properly,

2086 and this could not have occurred had this person used the ordinary hot and cold water faucets on the shower.

If you will allow us to go along without the mixing valve at the present time, we feel quite confident that in the very near future there will be perfected and patented a certain small apparatus that will absolutely be fool-proof and will automatically shut off the hot water at any given temperature that will be designated on this small valve.

We can assure you that we are not asking you to allow the omission of this mixing valve, in any
2087 manner of trying to save any money, as we would gladly spend an equal amount of the cost of this mixing valve in some other direction on the building.

Trusting after giving this letter due consideration, you will agree with us, and that we may have a favorable reply from you, with the assurance that as soon as this new valve is perfected and put on the market, we will be more than pleased to install it on all of the showers, and awaiting your kind reply, we remain

Yours very truly,

2088 CENTRAL PARK PROPERTIES, INC.
By L HAAS
Secretary.

LH:EB.
(CC Grad-Kingsley-Youngs-Lush-Klein)

Plaintiff's Exhibit 22.

[Letterhead of A. E. Lefcourt Realty Holdings.]

2089

February 5th, 1930.

Mr. G. S. Braislin, Vice President
The Prudence Company, Inc.,
331 Madison Avenue,
New York City.

Dear Sir:

Mr. Haas brought to my attention the letter that he wrote to you on January 23rd in answer to your letter of the 21st in reference to your late request for wood floors in certain rooms to be installed in the 59th Street Building now being constructed. Mr. Haas also mentioned his telephone conversation with you.

2090

While I have always been in the position to cooperate with anyone in my life, at the same time, I do not see how you can possibly make this request at this late date, particularly so when our agreement and specifications were agreed upon between us for cement floors along the same lines as the Savoy Plaza, which we spoke about at the time we drew up the agreement.

2091

Wooden floors as we all know, are a thing of the past, and so are rugs. I believe that the Savoy Plaza Hotel where I have been living for the past three years is a fair example of what is being done and built in up-to-date apartment hotels.

Plaintiff's Exhibit 22

2092 Under the circumstances, therefore, I feel that the plans and specifications accepted by you at the time we drew up the agreement between us, shall stand. I assure you that this is not a question of dollars and cents, but merely a question of principle, as well as the fact as stated above, that wooden floors are not wanted today in up-to-date apartment hotels.

Very truly yours,

A E LEFCOURT

AEL:L

2093

2094

Plaintiff's Exhibit 23.

March 15, 1930 2095

Central Park Properties, Inc.,
1359 Broadway,
New York, N. Y.

Att: Mr. Louis Haas, Secretary.

Re: Central Park So. S/S running
Thro. to W. 58th St. N. Y. C.

Gentlemen:

In reference to your letter of the 3rd inst., your request contained therein has been considered.

You are advised that this department has no 2096
objection to the use of the enamel iron tub and sink as submitted, providing the fixtures mentioned therein are of similar patent and size as were heretofore approved.

It is also understood that this enamel is subject to the acid test provided by the manufacturer.

Very truly yours,

THE PRUDENCE COMPANY, INC.
By W. G. Walters, Ch. Eng.
ENGINEERING & INSPECTION DEPT.

WGW:FG

2097

Plaintiff's Exhibit 24.

2098

[Letterhead of A. E. Lefcourt Realty Holdings.]

March 24th, 1930.

The Prudence Co.,
162 Remsen Street,
Brooklyn, N. Y.

Re:—Central Park Properties
Att. Mr. W. G. Walters

Gentlemen:—

2099 We hereby request reconsideration as to the use of a cement base with a wood moulding at top in place of the moulded wood base as specified.

As you know, it is a known fact that a cement base with a moulded wood top is more durable and sanitary and less of an unkeep than the fireproof moulded wood base, as the chemical injected for the fireproofing of the wood usually reacts upon the outside surface of the base, causing the scaling and peeling off of the paint surface, thereby leaving a very unsightly condition. You will recall that the manager of the Savoy Plaza also called our attention to this fact and condition a

2100 short time ago.

Your reconsideration regarding this matter would be greatly appreciated.

Very truly yours,

Central Park Properties, Inc.
By L. Haas
Secretary.

EHK:LS K.

Plaintiff's Exhibit 25.

2101

[Letterhead of A. E. Lefcourt Realty Holdings.]

April 7, 1930

Prudence Co.
162 Remsen St.
Brooklyn, N. Y.

Re: Central Park Properties

Att: Mr. W. G. Walters, Chief Engr.
Engineering & Inspecting Dept.

Gentlemen:

2102 We hereby request reconsideration as to the use of 2" gypsum block in place of terra cotta blocks for incasing of all of the interior columns.

We are asking for the above in view of the fact that on one of our recent jobs, we had considerable trouble with the Building Department in using the so-called 2" terra cotta blocks but which in reality are 1⅞" thick. The Building Department, as an alternative, said that they would accept the full 2" solid gypsum block which we used throughout the balance of this said operation and which passed the Building Department's requirements.

2103 We therefore kindly ask you to give us permission to use the full 2" solid gypsum blocks in place of the 1⅞" terra cotta blocks.

Hoping to receive an early reply from you regarding the above matter, we remain

Very truly yours,

Central Park Properties, Inc.
By L. Haas
K.

EHK:BS

Plaintiff's Exhibit 26.

2104

April 8th, 1930

Central Park Properties, Inc.,
1359 Broadway,
New York, N. Y.

Attention of: Mr. Klein

Re: Central Park So. running thru.
to West 58th St. Manhattan, N. Y.

Gentlemen:—

Upon my visit to the above operation on Mon-
2105 day, April 7th, I noticed a load of tubs being delivered to the job.

You will recall our letter of the 15th ultimo, wherein we stipulated that the enamel-ware was to be of acid resisting enamel.

The tubs being delivered are not in accordance with the above stipulation. We, therefore, instructed your superintendent to stop deliveries and installation of same.

Trusting you will give the above matter your immediate attention, we remain

Very truly yours,

2106 THE PRUDENCE COMPANY, INC.
By—W. G. Walters, Ch.Eng.
ENGINEERING & INSPECTION DEPT.

WGW:FG

Plaintiff's Exhibit 27.

April 10th, 1930 2107

Central Park Properties, Inc.,
1359 Broadway,
New York, N.Y.

Att:—Mr. Louis Haas, Secretary

Re: Central Park So. running thru.
to West 58th Street—Manhattan.

Gentlemen:—

This is to advise you that we have approved the following materials and equipment for use in the construction of the above building. 2108

1. McQuay copper radiators.
2. Electrolux gas ranges.
3. Copperior copper bearing sheet steel for duct work, etc.
4. Hardware, as outlined in the specifications received April 10th, 1930.
5. Speakman brass fittings, in accordance with cuts submitted.

Our requirements as previously requested in regard to mixometers, has been waived. 2109

Very truly yours,

THE PRUDENCE COMPANY, INC.
By—W. G. Walters, Ch.Eng.
ENGINEERING & INSPECTION DEPT.

WGW:FG

Plaintiff's Exhibit 28.

2110

April 10th, 1930

Central Park Properties, Inc.,
1359 Broadway,
New York, N. Y.

Att:—Mr. Louis Haas, Secretary

Re:—Central Park So. S/S running thru. to W. 58th St.—Manhattan.

Gentlemen:—

Your letter of April 7th, is hereby acknowl-
2111 edged.

In view of the circumstances, as stated therein, the use of 2″ solid gypsum blocks for the fireproofing of the columns, is acceptable to us, providing, however, that 2″ terra cotta blocks are used around columns wherever wall tile is applied thereto, and plastered with cement plaster to make up the thickness required by the Building Department.

The above acceptance is on condition that same is also approved by the Building Department of the Borough of Manhattan.

2112 Very truly yours,

THE PRUDENCE COMPANY, INC.
By—W. G. Walters, Ch.Eng.
ENGINEERING & INSPECTION DEPT.

WGW:FG

Plaintiff's Exhibit 29.

April 10th, 1930 2113

Central Park Properties, Inc.,
1359 Broadway,
New York, N. Y.

Att: Mr. Louis Haas, Secretary.

Re: Central Park So. S/S running thru.
to West 58th St. New York City.

Gentlemen:

Confirming a conference held in this office, on April 9th, we wish to advise you that our requirement as stipulated in our letter of March 15th, has 2114
been re-considered.

In lieu of same, we will accept the Wold Duro-Enamel bath tubs for use in the above operation. The kitchen and pantry sinks are to be of acid resisting enamel, as manufactured by the above company.

Very truly yours,

THE PRUDENCE COMPANY, INC.
By W. G. Walters, Ch. Eng.
ENGINEERING & INSPECTION DEPT.

WGW:FG

2115

Plaintiff's Exhibit 30.

2116

April 15th, 1930

Central Park Properties, Inc.,
1359 Broadway,
New York, N. Y.

Att: Mr. Louis Haas, Secretary

Re: Central Park So. S/S running thru. to West 58th St. E. 7th Ave. N.Y.C.

Gentlemen:

Will you kindly have your tile contractor submit certificates for the tile to be used on the above
2117 operation. These certificates are to certify as to the quality of the tile furnished in shipments and containers.

Your kind attention to the above will be greatly appreciated.

Very truly yours,

THE PRUDENCE COMPANY, INC.
By W. G. Walters, Ch. Eng.
ENGINEERING & INSPECTION DEPT.

WGW:FG

2118

Plaintiff's Exhibit 31.

2119

April 15, 1930

Central Park Properties, Inc.,
1359 Broadway,
New York, N. Y.

Attention: Mr. Louis Haas, Secretary

Re: Central Park So. S/S running thru.
to W. 58th St. E. 7th Ave. Manhattan.

Gentlemen:

Your request as outlined in your letter of the 24th ultimo, has been carefully considered.

2120

We wish to advise you that same has been approved by us on condition that a sketch be submitted, showing the height and profile of the base.

Will you kindly give the above matter your immediate attention, and oblige

Very truly yours,

THE PRUDENCE COMPANY, INC.
By W. G. Walters, Ch. Eng.
ENGINEERING & INSPECTION DEPT.

WGW:FG

2121

Plaintiff's Exhibit 32.

2122

April 21st, 1930

Central Park Properties, Inc.,
1359 Broadway,
New York, N. Y.

Att: Mr. L. Haas, Secretary

Re: Central Park So. S/S running through to W. 58th St. 100' E. of 7th Avenue, Manhattan, N. Y.

Gentlemen:

2123 Confirming conversation in this office today, with your Mr. Klein, we wish to advise you that we have amended the glazing specification as follows.

For the lower sash of all windows on the 7th floor and above, glass is to be of double strength 26 oz. d.s.A., flat drawn sheet glass, in accordance with the sample submitted.

Very truly yours,

THE PRUDENCE COMPANY, INC.
By W. G. Walters, Ch. Eng.
ENGINEERING & INSPECTION DEPT.

2124 WGW:FG

Plaintiff's Exhibit 33.

Date—Mar. 4/30

REQUISITION FOR ADVANCE ON BUILDING LOAN

LOCATION—155-165 W. 58 St. & 160-170 W. 59 St.

BORROWER—Central Park Properties, Inc.

REQUISITION No. 1.

CERTIFICATE OF ARCHITECT

THIS IS TO CERTIFY that.....

.....

has substantially completed miscellaneous construction work in connection with the construction of.....

at, ... amounting to.....for labor and materials actually incorporated in said building.

.....

Architect.

Budget Item No.	Class of Work	1 Name of Sub-Contractor	2 Estimated Sub-Contracts To Be Let	3 Sub-Contracts Let Exclusive of Extras	4 Extras or Deductions	5 Total Value of Work Incorporated To-Date	6 Prudence Co., Inc. Appraisal
1	Operation Costs		133,000.00	171,879.56		125,129.56	
	Itemize under Remarks						
2	Plant Equipment						
	Itemize under Remarks						
3	Excavation						
4	Shoring and Sheet Piling	Geo. J. Atwell		146,938.31	13,382.02	160,320.33	
5	Foundations and Piers						
6	Waterproofing—Damproofing, Sprandel		10,000.00				
7	Steel Structure	A. E. Norton		472,000.00		283,200.00	
8	Orn. Iron and Bronze	Madison Iron Wks.	Bronze 35,000.00	36,500.00		3,650.00	
9	Brickwork						
	Excluding Partitions See No. 25	J. H. McNally, Inc.		475,100.00		4,751.00	
10	Plumbing + 16 ●	C. H. Darmstadt		600,000.00		6,000.00	
11	Floor Arches + 24	Pietronski & Konap		260,000.00		52,000.00	
12	Electric Work ●	Lord Electric Co.		130,000.00		13,000.00	
13	Granite + 14	James McLaren & Son		38,750.00		1,937.50	
14	Cut Stone, Facade						
15	Elevators	Otis Elevator Co.		211,031.00		2,110.31	
16	Heating						
17	Carpentry—Rough						
	Separate from Finished Carpentry						
18	Hardware—Rough						
19	Wood Win. Frames and Sash						
20	Met. Win. Frames and Sash	S. H. Pomeroy Co. Inc.		61,600.00			
21	Glass and Glazing		45,000.00				
22	Sheet Met. and Skylights						
23	Roofing + 22	Fordham Cornice		16,700.00			
24	Cin. Fill and Cem. Finish						
25	Partitions						
	Keep separate from Brickwork						
26	Dumbwaiters						
27	Metal Lath and Furring + 28		350,000.00				
28	Plastering						
29	Ventilation						
30	Carpentry Finish		250,000.00				
	Doors and Trim	Hollow Metal Prod. Corp.		70,000.00			
	Doors and Trim						
	Hardware						

Budget Item No.	Class of Work	1 Name of Sub-Contractor	2 Estimated Sub-Contracts To Be Let	3 Sub-Contracts Let Exclusive of Extras	4 Extras or Deductions	5 Total Value of Work Incorporated To-Date	6 Prudence Co., Inc. Appraisal	7 Total Cash Paid on Contracts per Receipts Submitted
1	Operation Costs		133,000.00	171,879.56		125,129.56		
	Itemize under Remarks							
2	Plant Equipment							
	Itemize under Remarks							
3	Excavation							
4	Shoring and Sheet Piling	Geo. J. Atwell		146,938.31	13,382.02	160,320.33		
5	Foundations and Piers							
6	Waterproofing—Damproofing, Sprandel		10,000.00					
7	Steel Structure	A. E. Norton		472,000.00		283,200.00		
8	Orn. Iron and Bronze	Madison Iron Wks.	Bronze 35,000.00	36,500.00		3,650.00		
9	Brickwork							
	Excluding Partitions See No. 25	J. H. McNally, Inc.		475,100.00		4,751.00		
10	Plumbing + 16	C. H. Darmstadt		600,000.00		6,000.00		
11	Floor Arches + 24	Pietronski & Konap		260,000.00		52,000.00		
12	Electric Work	Lord Electric Co.		130,000.00		13,000.00		
13	Granite + 14	James McLaren & Son		38,750.00		1,937.50		
14	Cut Stone, Facade							
15	Elevators	Otis Elevator Co.		211,031.00		2,110.31		
16	Heating							
17	Carpentry—Rough							
	Separate from Finished Carpentry							
18	Hardware—Rough							
19	Wood Win. Frames and Sash							
20	Met. Win. Frames and Sash	S. H. Pomeroy Co. Inc.		61,600.00				
21	Glass and Glazing		45,000.00					
22	Sheet Met. and Skylights							
23	Roofing + 22	Fordham Cornice		16,700.00				
24	Cin. Fill and Cem. Finish							
25	Partitions							
	Keep separate from Brickwork							
26	Dumbwaiters							
27	Metal Lath and Furring + 28		350,000.00					
28	Plastering							
29	Ventilation							
30	Carpentry, Finish		250,000.00					
31	Kal. Doors and Trim	Hollow Metal Prod. Corp.		70,000.00				
32	Hol. Met. Doors and Trim							
33	Finished Hardware		40,000.00					
34	Interior Marble		30,000.00					
35	Tile Work							
	Halls and Bathrooms		100,000.00					
36	Terrazzo		10,000.00					
37	Mail Chute and Box		9,000.00					
38	Apt. Ice Boxes		70,000.00					
39	Painting and Paint Finish		125,000.00					
40	Wood Floors		5,000.00					
41	Bath Room Accessories							
	Itemize under Remarks		20,000.00					
42	Electric Fixtures		50,000.00					
43	Kitchen Equipment							
	Itemize under Remarks		45,000.00					
44	Furnishings	Garbage Distributors	12,000.00					
	Itemize under Remarks	Medicine Chests	10,000.00					
45	Refrigerating Plant		20,000.00					
46	Revolving Doors		5,000.00					
47	Laundry Equipment							
48	Sidewalk Bridge	Chesebro, Whitman		5,545.00				
49	Arch. Terra Cotta	O. W. Ketcham		32,500.00				
50	Shower Doors		1,000.00					
51	Sound proofing		15,000.00					
			1,390,000.00	2,728,543.87	13,382.02	652,098.70		
			TENTATIVE NOT FINAL					

Plaintiff's Exhibit 33.

Date—Mar. 4/30

CERTIFICATE OF ARCHITECT

THIS IS TO CERTIFY that.....

.....

has substantially completed miscellaneous construction work in connection with the construction of.....

at, ... amounting

to.....for labor and materials actually incorporated in said building.

.....

Architect.

IMPORTANT

The Architect's certificate and the affidavit must be signed and acknowledged before advances can be made.

STATE OF
COUNTY OF } ss.:

.....being duly sworn, deposes and says that he is.....of .....the owner of .....building in course of construction at..... that the estimated cost of all contracts heretofore let and to be let are shown in the statement herein below set forth; that said contracts are all the contracts necessary for the completion of said building, in accordance with plans and specifications heretofore submitted to The Prudence Company, Inc., and that said amounts here below set forth are correct. Said deponent is fully informed of said facts and makes this affidavit for the purpose of inducing The Prudence Company, Inc., to make payments from time to time on account of a loan to said owner, covering said building, to be used for paying for labor, work and material, in accordance with the various contracts and sub-contracts for the erection of said building.

Sworn to before me this.....day

of .....19...

.....

2 timated Contracts Be Let	3 Sub-Contracts Let Exclusive of Extras	4 Extras or Deductions	5 Total Value of Work Incorporated To-Date	6 Prudence Co., Inc. Appraisal	7 Total Cash Paid on Contracts per Receipts Submitted	8 Amounts Now Due Sub-Contractors	Remarks	
133,000.00	171,879.56		125,129.56				Architect—Frank Grad	10,000.00
							Mech. Eng.—E. A. Kingsley	9,450.00
							Cons. Eng.—Chas. Mayer	12,889.21
							Models—Newman Even	975.00
							Architect—Emery Roth	80,000.00
	146,938.31	13,382.02	160,320.33				Core—Borings—Sprague & Henwood	1,199.25
							Water Connection—Zucker Water Service	2,366.10
10,000.00								116,879.56
	472,000.00		283,200.00					
35,000.00	36,500.00		3,650.00				Material Hoist—Chesebro Whitman	55,000.00
	475,100.00		4,751.00				Estimate	
	600,000.00		6,000.00				Permits 10,000.00	
	260,000.00		52,000.00				Temp. platform 15,000.00	
	130,000.00		13,000.00				Shanties 3,000.00	
	38,750.00		1,937.50				Temp. Current 5,000.00	
							Payroll 100,000.00	
	211,031.00		2,110.31					133,000.00
	61,600.00							
45,000.00								
	16,700.00							
350,000.00								
250,000.00								
	70,000.00							
40,000.00								

Plaintiff's Exhibits 34 (2 checks representing the advance made upon the foregoing requisition), 35 (10 similar requisitions, dated March 31, 1930,

nated ontracts e Let	3 Sub-Contracts Let Exclusive of Extras	4 Extras or Deductions	5 Total Value of Work Incorporated To-Date	6 Prudence Co., Inc. Appraisal	7 Total Cash Paid on Contracts per Receipts Submitted	8 Amounts Now Due Sub-Contractors	Remarks	
33,000.00	171,879.56		125,129.56					
							Architect—Frank Grad	10,000.00
							Mech. Eng.—E. A. Kingsley	9,450.00
							Cons. Eng.—Chas. Mayer	12,889.21
							Models—Newman Even	975.00
	146,938.31	13,382.02	160,320.33				Architect—Emery Roth	80,000.00
							Core—Borings—Sprague & Henwood	1,199.25
10,000.00							Water Connection—Zucker Water Service	2,366.10
	472,000.00		283,200.00					116,879.56
35,000.00	36,500.00		3,650.00				Material Hoist—Chesebro Whitman	55,000.00
	475,100.00		4,751.00				Estimate	
	600,000.00		6,000.00				Permits 10,000.00	
	260,000.00		52,000.00				Temp. platform 15,000.00	
	130,000.00		13,000.00				Shanties 3,000.00	
	38,750.00		1,937.50				Temp. Current 5,000.00	
	211,031.00		2,110.31				Payroll 100,000.00	
								133,000.00
	61,600.00							
15,000.00								
	16,700.00							
30,000.00								
50,000.00								
	70,000.00							
40,000.00								
30,000.00								
00,000.00								
10,000.00								
9,000.00								
70,000.00								
25,000.00								
5,000.00								
20,000.00								
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45,000.00								
12,000.00								
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20,000.00								
5,000.00								
	5,545.00							
	32,500.00							
1,000.00								
15,000.00								
00,000.00	2,728,543.87	13,382.02	652,098.70					
NTATIVE T FINAL								

Plaintiff's Exhibits 34 (2 checks representing the advance made upon the foregoing requisition), 35 (10 similar requisitions, dated March 31, 1930, to September 22, 1930), and 36 (20 checks for further advances under such requisitions) are omitted from the printed record, pursuant to stipulation and order (*supra*, p. 565), subject to the right of either party to submit the same to the Court if so advised.

Plaintiff's Exhibit 37.

Date—October 6/30

REQUISITION FOR ADVANCE ON BUILDING LOAN

LOCATION—155-165 W. 58th St. & 160-170 W. 59th St.
BORROWER—Central Park Properties, Inc.

REQUISITION No. 12

October 6, 1930

CERTIFICATE OF ARCHITECT

THIS IS TO CERTIFY that.....

.....

has substantially completed miscellaneous construction work in connection with the construction of.....

at, ... amounting to.....for labor and materials actually incorporated in said building.

.....
Architect.

IMPORTA

The Archi
certificate
the affid
must be s
and acknowl
before adv
can be made

Budget Item No.	Class of Work	1 Name of Sub-Contractor	2 Estimated Sub-Contracts To Be Let	3 Sub-Contracts Let Exclusive of Extras	4 Extras or Deductions	5 Total Value of Work Incorporated To-Date	6 Prudence Co., Inc. Appraisal	7 Total Cash P on Contrac per Receip Submitted
1	Operation Costs Itemize under Remarks							
2	Plant Equipment Itemize under Remarks							
3	Excavation							
4	Shoring and Sheet Piling							
5	Foundations and Piers							
6	Waterproofing							
7	Steel Structure							
8	Orn. Iron and Bronze							
9	Brickwork Excluding Partitions See No. 25							
10	Plumbing							
11	Floor Arches							
12	Electric Work							
13	Granite							
14	Cut Stone, Facade							
15	Elevators							
16	Heating							
17	Carpentry—Rough Separate from Finished Carpentry							
18	Hardware—Rough							
19	Wood Win. Frames and Sash							
20	Met. Win. Frames and Sash							
21	Glass and Glazing							
22	Sheet Met. and Skylights							
23	Roofing							
24	Cin. Fill and Cem. Finish							
25	Partitions Keep separate from Brickwork							
26	Dumbwaiters							
27	Metal Lath and Furring							
28	Plastering							
29	Ventilation							
30	Carpentry Finish							
31	Kal. Doors and Trim							
32	Hol. Met. Doors and Trim							
33	Finished Hardware							
34	Interior Marble							

On October 3rd, 1930, the Bureau of Buildings of the Borough of Manhattan, City of New York, issued to the Central Park Properties, Inc., the usual Certificate of Completion #16873 (which is being delivered to you herewith) and we respectfully apply for the final payment due us amounting to $820,000 in accordance with agreement with you.

Very truly yours,

CENTRAL PARK PROPERTIES, INC.

By: LOUIS HAAS
Treasurer.

Architect.

udget tem No.	Class of Work	1 Name of Sub-Contractor	2 Estimated Sub-Contracts To Be Let	3 Sub-Contracts Let Exclusive of Extras	4 Extras or Deductions	5 Total Value of Work Incorporated To-Date	6 Prudence Co., Inc. Appraisal	7 Total Cash Pa on Contracts per Receipts Submitted
1	Operation Costs Itemize under Remarks							
2	Plant Equipment Itemize under Remarks							
3	Excavation							
4	Shoring and Sheet Piling							
5	Foundations and Piers							
6	Waterproofing							
7	Steel Structure							
8	Orn. Iron and Bronze							
9	Brickwork Excluding Partitions See No. 25							
10	Plumbing							
11	Floor Arches							
12	Electric Work							
13	Granite							
14	Cut Stone, Facade							
15	Elevators							
16	Heating							
17	Carpentry—Rough Separate from Finished Carpentry							
18	Hardware—Rough							
19	Wood Win. Frames and Sash							
20	Met. Win. Frames and Sash							
21	Glass and Glazing							
22	Sheet Met. and Skylights							
23	Roofing							
24	Cin. Fill and Cem. Finish							
25	Partitions Keep separate from Brickwork							
26	Dumbwaiters							
27	Metal Lath and Furring							
28	Plastering							
29	Ventilation							
30	Carpentry Finish							
31	Kal. Doors and Trim							
32	Hol. Met. Doors and Trim							
33	Finished Hardware							
34	Interior Marble							
35	Tile Work Halls and Bathrooms							
36	Terrazzo							
37	Mail Chute and Box							
38	Weather Strips							
39	Painting and Paint Finish							
40	Wood Floors							
41	Bath Room Accessories Itemize under Remarks							
42	Electric Fixtures							
43	Kitchen Equipment Itemize under Remarks							
44	Furnishings Itemize under Remarks							
45	Refrigerating Plant							
46	Revolving Doors							
47	Laundry Equipment							
48								
49								
50								
51								

On October 3rd, 1930, the Bureau of Buildings of the Borough of Manhattan, City of New York, issued to the Central Park Properties, Inc., the usual Certificate of Completion #16873 (which is being delivered to you herewith) and we respectfully apply for the final payment due us amounting to $820,000 in accordance with agreement with you.

Very truly yours,

CENTRAL PARK PROPERTIES, INC.

By: LOUIS HAAS
Treasurer.

Plaintiff's Exhibit 37.

OAN

Date—October 6/30

CERTIFICATE OF ARCHITECT

THIS IS TO CERTIFY that .....

.....

has substantially completed miscellaneous construction work in connection with the construction of .....

at, ... amounting to ..... for labor and materials actually incorporated in said building.

.....

Architect.

IMPORTANT

The Architect's certificate and the affidavit must be signed and acknowledged before advances can be made.

STATE OF
COUNTY OF } ss.:

..... being duly sworn, deposes and says that he is ..... of ..... the owner of ..... building in course of construction at ..... that the estimated cost of all contracts heretofore let and to be let are shown in the statement herein below set forth; that said contracts are all the contracts necessary for the completion of said building, in accordance with plans and specifications heretofore submitted to The Prudence Company, Inc., and that said amounts here below set forth are correct. Said deponent is fully informed of said facts and makes this affidavit for the purpose of inducing The Prudence Company, Inc., to make payments from time to time on account of a loan to said owner, covering said building, to be used for paying for labor, work and material, in accordance with the various contracts and sub-contracts for the erection of said building.

Sworn to before me this ..... day of ....., 19...

.....

2 Estimated Sub-Contracts To Be Let	3 Sub-Contracts Let Exclusive of Extras	4 Extras or Deductions	5 Total Value of Work Incorporated To-Date	6 Prudence Co., Inc. Appraisal	7 Total Cash Paid on Contracts per Receipts Submitted	8 Amounts Now Due Sub-Contractors	Remarks
							Owners Total Cost as of Sept. 22, 1930
							3,692,118.13
							375,000.—
							83,369.43
							4,150,487.56 Total
							3,456,925.52
							693,562.04 Increase in work.

On October 3rd, 1930, the Bureau of Buildings of the Borough of Manhattan, City of New York, issued to the Central Park Properties, Inc., the usual Certificate of Completion #16873 (which is being delivered to you herewith) and we respectfully apply for the final payment due us amounting to $820,000 in accordance with agreement with you.

Very truly yours,

CENTRAL PARK PROPERTIES, INC.

By: LOUIS HAAS
Treasurer.

Plaintiff's Exhibit 38.

(Requisitions similar in form to Exhibits 33, 35 and 37; formal portions have not been printed for this record, but originals may be submitted to Court by either party, if so advised, pursuant to stipulation.) 2131

REQUISITION FOR ADVANCE ON BUILDING LOAN

LOCATION—155-165 W. 58th St. & 160-170 W. 59th Street,
BORROWER—Central Park Properties, Inc.
Requisition No. 13

October 13th, 1930

We respectfully apply for balance $670,000.00 of final payment on the amount of $820,000.00 due on presentation of Certificate of Occupancy, which Certificate was delivered to you on October 6th, 1930.

Very truly yours, 2132

CENTRAL PARK PROPERTIES, INC.
By: Louis Haas,
Treasurer.

REQUISITION FOR ADVANCE ON BUILDING LOAN

LOCATION—155-65 W. 58th St. & 160-70 W. 59th St.
BORROWER—Central Park Properties, Inc.
Requisition No. 14

October 20th, 1930.

We respectfully apply for balance $570,000.00 of final payment on the amount of $820,000.00 due on presentation of Certificate of Occupancy, which certificate was delivered to you on October 6th, 1930.

Very truly yours,

CENTRAL PARK PROPERTIES, INC.
By: 2133
Treasurer.

REQUISITION FOR ADVANCE ON BUILDING LOAN

LOCATION—155-65 W. 58th St. & 160-70 W. 59th St.
BORROWER—Central Park Properties, Inc.
Requisition No. 15

November 3, 1930

We respectfully apply for balance $570,000.00 of final payment on the amount of $820,000.00 due on presentation of Certificate of Occupancy, which certificate was delivered to you on October 6th, 1930.

Very truly yours,

CENTRAL PARK PROPERTIES, INC.
By: Louis Haas
Treasurer.

Plaintiff's Exhibit 39.

2134 Form—244-1931 Certificate of Occupancy. 8A-2087-31-C.P.

BUREAU OF BUILDINGS

BOROUGH OF MANHATTAN, CITY OF NEW YORK

CERTIFICATE OF OCCUPANCY No. 16873 1930

hvc

Supersedes Certificate of Occupancy No.

New York Oct. 3, 1930

To the owner or owners of the building:

THIS CERTIFIES that the building located on Block 1011, Lot 5 known as 153-67 West 58th Street—158-72 Central Park South 206′ 4″ front
2135 under a permit, Application No. 397 N.B. of 1929, conforms to the approved plans and specifications accompanying said permit and any approved amendments thereto, and to the requirements of the building code and all other laws and ordinances and to the rules and regulations of the board of standards and appeals, applicable to a building of its class and kind, except that in the case of a building heretofore existing and for which no previous certificate of occupancy has been issued and which has not been altered or converted since March 14, 1916, to a use that changed
2136 its classification as defined in the building code, this certificate confirms and continues the existing uses to which the building has been put; and

CERTIFIES FURTHER that the building is of fireproof construction within the meaning of the building code and may be used and occupied as a business and residence building as hereinafter qualified, in a business and residence district under the building zone resolution, subject to all the priveleges, requirements, limitations and con-

ditions prescribed by law or as hereinafter specified. 2137

Story	Live Loads Lbs.perSq.Ft.	Persons Accommodated Male	Female	Total	Use
Cellar					Storage
1st Story	120-40			150	Stores and Hotel
2nd to 7th Story	40 on each			125. on each	
8th to 10th Story	40 on each			117 on each	
11th & 12th Story	40 on each			58 on each	
					Hotel
13th to 16th Story	40 on each			42 on each	
17th to 36th Story	40 on each			40 on each	
37th Story	40			35	
38th to 40th Story	40 on each			15 on each	
Tower					Machine rooms

2138

This certificate is issued to Central Park Properties, Inc., 1359 Broadway, New York City, for the owner or owners.

(Page 1)

COPY

The superimposed, uniformly distributed loads, or their equivalent concentrated loads in any story shall not exceed the live loads specified above; the number of persons of either sex in any story shall not exceed that specified when sex is indicated, nor shall the aggregate number of persons in any story exceed the specified total; and the use to which any story may be put shall be restricted to that fixed by this certificate except as specifically stated. 2139

The building or any part thereof shall not be used for any purpose other than that for which it is certified.

Unless specifically stated above, the building or any part thereof, if certified as a public building,

2140 shall not be used as a building in which persons are harbored to receive medical, charitable or other care or treatment, such as a hospital, asylum, etc., or in which persons are held or detained under legal restraint, such as a police station, jail, etc.; nor shall it be used as a motion picture theatre as defined in section 30, chapter 3, Code of Ordinances; nor as a theatre or opera house or other building intended to be used for theatrical or operatic purposes, or for public entertainment of any kind, for the accommodation of more than 300 persons.

2141 Unless specifically stated above, the building or any part thereof, if certified as a residence building, shall not be used as a tenement house as defined in the tenement house law; nor shall it be used as any form of residence building having more than 15 sleeping rooms; nor shall it be used as a lodging house within the meaning of Sec. 1305 of the Greater New York Charter.

2142 Unless specifically stated above, the building or any part thereof, if certified as a business building, shall not be used as a garage, motor vehicle repair shop or oil selling station as defined in section 1, chapter 10, Code of Ordinances; nor shall it be used for the generation or compression of acetylene; nor as a factory building as defined in the labor law; nor as a grain elevator; nor as a coal pocket.

Except as otherwise noted above, the building, or any part thereof, if located elsewhere than in an unrestricted district, shall not be used for any of the purposes enumerated in paragraph (a) of section 4 of the building zone resolution; nor for any trade, industry or use that is noxious or offensive by reason of the emission of odor, dust,

smoke, gas or noise; nor for any kind of manufacturing not already prohibited, except that, if located in a business district, not more than twenty-five per cent. of the total floor space may be so used, or space equal to the area of the lot in any case. 2143

Except as otherwise noted above, the building, if certified as a garage, may not be used for more than five cars on any portion of a street between two intersecting streets, in which portion there exists an exit from or an entrance to a public school, or in which portion there exists any hospital maintained as a charitable institution; and in no case within a distance of 200 feet from the nearest exit from or entrance to a public school; nor within two hundred feet of any hospital maintained as a charitable institution. 2144

If the building has, at any time previous to the issuance of this certificate, been the subject of an appeal to the board of appeals or of a petition to the board of standards and appeals resulting in modification or variation of law or any lawful requirement, the construction and arrangement of the building as specified in the resolution granting such modification or variation, must be maintained, and all conditions imposed by either board must be observed. 2145

No change or re-arrangement in the structural parts of the building, or affecting the lighting or ventilation of any part thereof, or in the exit facilities, shall be made; no enlargement, whether by extending on any side or by increasing in height shall be made; nor shall the building be moved from one location or position to another; nor shall there be any reduction or diminution of the area of the lot or plot on which the building is located,

2146 until an approval of the same has been obtained from the superintendent of buildings.

This certificate supersedes each and every previously issued certificate of occupancy for this building or any part thereof, and each and every such previously issued certificate shall be null and void; and this certificate in turn becomes null and void upon the issuance of any new lawful certificate.

This certificate does not in any way relieve the owner or owners, or any other person or persons in possession or control of the building, or any part thereof, from obtaining such other permits
2147 or licenses as may be prescribed by law for the uses or purposes for which the building is designed or intended; nor from complying with any lawful order issued with the object of maintaining the building in a safe or lawful condition; nor from complying with any authorized direction to remove encroachments into a public highway or other public place, whether attached to or part of the building or not.

This certificate does not authorize the use or operation of any elevator in the building without the special certificate required by section 563 of the building code.

2148 If the building is or is required to be equipped with standpipes or other fire extinguishing or gas shut off appliances, this certificate is not complete until such standpipes or other appliances have been inspected by the fire department (or by the Tenement House Department in the case of a gas shut off in a tenement house) and approved in

writing, either in a separate certificate or by endorsement upon this certificate. (Space for such endorsement is provided on page 4 of this certificate.) 2149

If this certificate is marked "Temporary," it is applicable only to those parts of the building indicated on its face, and certifies to the legal use and occupancy of only such parts of the building; it is subject to all the provisions and conditions applying to a final or permanent certificate; it is not applicable to a tenement house unless also approved by the tenement house commissioner; and it must be replaced by a full certificate as soon as the entire building is completed according to law and ready for occupancy. 2150

The word "class" as used in this certificate refers to the classification of buildings in the building code (section 70).

This certificate is issued in accordance with the provisions of section 411-a of the Greater New York Charter and of section 5 of chapter 5 (Building Code) of the Code of Ordinances of the City of New York.

Examined.

CB

CHARLES BRADY 2151
Superintendent of Buildings,
Borough of Manhattan.

NK

Additional copies of this certificate will be issued, upon written request, to persons having a proprietary interest in the building.

Plaintiff's Exhibit 40.

2152

[Letterhead of A. E. Lefcourt Realty Holdings.]

November 1st, 1930.

Prudence Co. Inc.,
162 Remsen Street,
Brooklyn, N. Y.

Gentlemen:—

We herewith again enclose requests calling for full balance due us in accordance with the agreement between us.

2153

Very truly yours,

Central Park Properties, Inc.

By: Melvin Brown
Vice President & Comptroller

MB:AL

2154

Plaintiff's Exhibit 41.

[Letterhead of Fidelity and Deposit Company of Maryland] 2155

November 17th, 1930

The Prudence Company, Inc.
162 Remsen Street
Brooklyn, New York

Re: #526651—A.B.C.—Central Park Properties, Inc.
#3679515—Central Park Properties, Inc.

Attention: Mr. Braslin 2156

Dear Sir:

Will you please advise us regarding the status of the above captioned case? The writer recalls that on June 11th, you informed us that the contract was at that time over 50% complete and progressing to your entire satisfaction.

We would like to check up on the status of the work at the present time and would appreciate a word of advice from you.

Very truly yours,

Allan Major Race 2157
Allan Major Race, Mgr.
Contract Department.

AMR:EM

Plaintiff's Exhibit 42.

2158 [Letterhead of American Bonding Company of Baltimore]

November 21st, 1930

Mr. Braislin, Vice-President
The Prudence Company
162 Remsen Street
Brooklyn, New York

Re: #526651—Central Park Properties Inc. —guar. completion of modern 40 story basement fireproof hotel etc. located at 140-172 Central Park South and 151-157 W. 58th
2159 Street, New York City

Dear Sir:

Following our telephone conversation with you of the other day, we would be pleased to have you either send us a photostatic copy of the certificate of occupancy in connection with the above bond, or allow us to see it when we call at the office.

Will it be asking too much to ask you to let us know about this as soon as possible?

Very truly yours,

Allan Major Race

2160 Allan Major Race, Mgr.
AMR:EM Contract Department

Plaintiff's Exhibit 43.

November 24th, 1930. 2161

American Bonding Company,
16 Court Street,
Brooklyn, N. Y.

Attention: Mr. A. M. Race.

Gentlemen:—

In answer to your letter of November 21st relative to your bond #526651, Central Park Properties, Inc., we advise that any certificate of occupancy of the building has no connection with your bond. Whatever certificates have been issued are doubtless available at the office of the principal, Central Park Properties, Inc., and it is suggested that you address your inquiry to the principal on your bond. 2162

Very truly yours,

Vice-President and General Counsel.

M-F

THE PRUDENCE COMPANY, Inc. Memorandum
To Mr. Braislin From Mr. Mark

Date Nov. 24, 1930.

If you have anything to add to the enclosed letter relative to the bond on the Lefcourt job, please let me know; otherwise you may send out the letter. 2163

SM

I have no changes to suggest. Letter sent out 11/25/30.

HB

Plaintiff's Exhibit 44, consisting of 10 checks
2164 constituting the final advances of the loan, is omitted from the printed record, pursuant to stipulation and order (*supra,* p. 565) subject to the right of either party to submit the same to the Court if so advised.

Plaintiff's exhibits for identification numbered 45, 46, 47, 48, 49 and 50, consisting of reports and estimates by Mr. Billsborrow, were marked in evidence as Defendant's Exhibit B of May 8, 1934, and are printed at page 805, *infra.*

2165

Plaintiff's Exhibit 51.

December 17th, 1930.

Central Park Properties, Inc.,
160 West 59th Street,
New York City.

Gentlemen:—

Mortgage in the amount of $6,650,000 on premises on the south side of 59th Street east of Seventh Avenue, owned by you, was due and payable
2166 on December 16th, 1930 and payment thereof has not been made.

Unless payment is made immediately, we will be obliged to place this mortgage in the hands of counsel for foreclosure.

Very truly yours,

Vice-President.

M-F

Plaintiff's Exhibit 52.

CENTRAL PARK PROPERTIES, INC. acknowledges 2167
that it has received from THE PRUDENCE COMPANY, INC., the sum of THREE HUNDRED THOUSAND ($300,000) DOLLARS as an advance upon mortgages consolidated in lien and as consolidated comprising one lien for Six Million, Six hundred and fifty thousand ($6,650,000) Dollars covering premises on the south side of 59th Street, 100 feet east of Seventh Avenue, said premises being 206 ft. 4 in feet in width along 59th Street and extending through to the northerly side of 58th Street. The total amount advanced to date is SIX MILLION, SIX HUNDRED FIFTY THOUSAND ($6,650,000) DOLLARS and Central Park Properties, Inc. hereby certifies 2168
that the full amount of said mortgage has been advanced.

Dated New York, December 5th, 1930.

CENTRAL PARK PROPERTIES, INC.,
By: MELVIN BROWN
Vice Pres.
[SEAL]

STATE OF NEW YORK, County of New York, ss.:

On this 5th day of December, 1930, before me personally came to me known, 2169
who, being by me duly sworn did depose and say that he resides at that he is the of CENTRAL PARK PROPERTIES, INC., the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

Plaintiff's Exhibit 53.

2170 Mr. Braislin:

Re: Weekly Inspection Report on Lefcourt Central Park South Job, for week ending December 27th, 1930

Seven daily inspections were made by me including Sunday and Christmas Day.

There has been no construction work of any kind going on since December 23, 1930, except the testing of the gas refrigerators in the serving pantries, which is being done by three workmen.

One day and one night watchman has been on the premises continually. These men I understand
2171 are in the employ of the Prudence Company, but I am led to believe that they are and have been paid by the owner up to December 26th, 1930.

There are also four maintenance mechanics on the premises. These men are and have been paid by the owner up to December 27th, 1930.

The building has been continually heated, the steam being taken from the street main of the New York Steam Company. The plumbing system is in operation with water circulation through the piping.

On December 23rd, 1930 the painting contractor
2172 removed all his ladders, scaffolding, etc, also the material including large unopened cans of paint. I phoned this information to Mr. Billsborrow, in your absence, and was informed that it was O.K.

NEW YORK APPRAISAL DEPT.
By Peter A. Weller.

December 29th, 1930
L.

Plaintiff's Exhibit 54.

Mr. Braislin: 2173

Re: Weekly inspection report on Lefcourt Central Park South Job for week ending January 3rd, 1931.

Six daily inspections were made by me including Sunday.

Our watchman and the owner's maintenance mechanics have been on the premises.

The building has been continually heated and the plumbing system in operation, but on January 2nd a number of men from the Dahmstadt Plumbing Company started to drain the system and tanks and shut down on the steam. This work is 2174
being done under Mr. Billsborrow's supervision.

NEW YORK APPRAISAL DEPT.
By: Peter A. Weller

January 5, 1931
L.

Plaintiff's Exhibit 55.

January 6, 1931.

Mr. Charles C. Peters,
305 Broadway,
New York, N. Y. 2175

My dear Mr. Peters:

We are sending you herewith two copies of the agreement giving us possession of the Central Park Properties, Inc. building on Central Park South 100 feet east of 7th Avenue, New York.

If you will let me know as soon as these are signed, we will send over for them.

Yours truly,

G. S. BRAISLIN
Vice-President.

Plaintiff's Exhibit 56.

[Letterhead of Fidelity and Deposit Company of Maryland]

January 7th, 1931

Prudence Company, Inc.
331 Madison Avenue
New York City

Re: #526651—A.B.C.—#3679515—Central Park Properties—Guar. completion of modern 40-story & basement fireproof hotel etc. located at 140-172 Central Park South and 151-157 W. 58th Street, New
2177 York City

Attention: Mr. Braslin

Gentlemen:

You will perhaps recall a conversation with the writer some time ago regarding the condition of the contract covered by the above captioned bonds. At that time, you could not advise us of the status of the contract, saying that there were a few small things not yet done. It is probable, since two or three months have elapsed, that the contract has been actually completed and, if so, we would ap-
2178 preciate your advices on the subject.

Very truly yours,

Allan Major Race
Allan Major Race, Mgr.
Contract Department.

AMR:EM

Plaintiff's Exhibit 57.

Registered

2179

January 13, 1930.

Fidelity & Deposit Company of Maryland,
55 Liberty Street,
New York City.
American Bonding Company of Baltimore,
16 Court Street,
Brooklyn, N. Y.

Re: Your Bond #526651, Central Park Properties, Inc., Fidelity & Deposit Company of Maryland and American Bonding Company of Baltimore to The Prudence Company, Inc., premises south side of 59th Street 100 feet east of Seventh Avenue, Borough of Manhattan New York City.

2180

Gentlemen:

We hereby give you notice that a Conditional Bill of Sale in the sum of $215,000. made by Central Park Properties, Inc. to Otis Elevator Company, dated December 20th, 1929 was filed in the office of the Clerk of the County of New York on December 31st, 1930 under the number 75401.

In accordance with your said Bond, dated the 25th day of September, 1929, we demand that within thirty days immediately following your receipt of this notice you cause the foregoing to be paid and/or released and cancelled of record to the satisfaction of our counsel.

2181

Very truly yours,

G. S. Braislin
Vice-President

AJ:DB

[Registered receipts of letter of January 13, 1930 to American Bonding Company of Baltimore and Fidelity & Deposit Company of Maryland were attached to this Exhibit.]

Plaintiff's Exhibit 58.

2182 [Letterhead of Fidelity and Deposit Company of Maryland]

January 16, 1931.

The Prudence Company, Inc.,
162 Remsen Street,
Brooklyn, N. Y.

Attention: Mr. G. J. Braislin, Vice-President.
Re: Bond No. 526651—Central Park Properties, Inc.—The Prudence Co. Inc.

Dear Sirs:

2183 We have received your letter of January 13th in reference to the above bond, and the subject therein referred to will receive our immediate attention.

Very truly yours,

Wallace P. Harvey, Esq.
Wallace P. Harvey
General Counsel & Vice-President.

WPH:AER

2184

Plaintiff's Exhibit 59.

2185

[Letterhead of American Bonding Company of Baltimore]

January 16, 1931.

The Prudence Company, Inc.,
162 Remsen Street,
Brooklyn, N. Y.

Attention: Mr. G. J. Braislin, Vice-President.
Re: Bond No. 526651—Central Park Properties, Inc.—The Prudence Co. Inc.

Dear Sirs:

2186

We have received your letter of January 13th in reference to the above bond, and the subject therein referred to will receive our immediate attention.

Very truly yours,

Wallace P. Harvey, Esq.
Wallace P. Harvey
General Counsel & Vice-President.

WPH:AER

2187

Plaintiff's Exhibit 60.

2188

February 14th, 1931.

Fidelity & Deposit Company of Maryland,
55 Liberty Street,
New York City.
American Bonding Company of Baltimore,
16 Court Street,
Brooklyn, New York.
Central Park Properties, Inc.,
1359 Broadway,
New York City.

2189

Re: Bond #526651, Central Park Properties, Inc., Fidelity & Deposit Company of Maryland & American Bonding Company of Baltimore to The Prudence Company, Inc., premises south side of 59th Street 100′ east of Seventh Ave., Borough of Manhattan, New York City.

Gentlemen:

We hereby notify you that the work on the building on the S/S of Central Park South, 100′ E. of 7th Avenue, running through to West 58th Street, New York, has not been done as required
2190 by the Surety Bond, the Building Loan Agreement and the Plans and Specifications affecting this property, and that there is still a considerable amount of work to be done.

We are having a survey made which will show the exact items still to be completed in this build-

ing, and will forward a copy of this to you as soon as it is received by us. 2191

Very truly yours,

G. S. BRAISLIN
Vice President.

GSB:ech

[Registered receipts of letter of February 14, 1931, to Fidelity & Deposit Company of Maryland, American Bonding Company of Baltimore and Central Park Properties, Inc., were attached to this Exhibit.]

Plaintiff's Exhibit 61.

[LETTERHEAD OF AMERICAN BONDING COMPANY OF BALTIMORE] 2192

February 16th, 1931.

Re: #526651—Central Park Properties, Inc. COMPLETION BOND guaranteeing completion of modern forty story and basement fireproof Hotel, etc. located at 140-172 Central Park South and 151-157 W. 58th St., New York City.

Mr. G. S. Braislin, Vice-President
The Prudence Company, Inc.
162 Remsen Street 2193
Brooklyn, N. Y.

Dear Sir:—

We have received your letter of February 14th. in connection with the above captioned bond and have referred it to the Legal Department of the Fidelity and Deposit Company of Maryland, 55 Liberty Street, New York City, to whom we would request that you refer all subsequent correspondence on this matter.

Very truly yours,

ALLAN MAJOR RACE
ALLAN MAJOR RACE, Manager
Contract Department

AMR:C

Plaintiff's Exhibit 62.

2194 REGISTERED.

February 25, 1931.

Fidelity & Deposit Company of Maryland,
55 Liberty Street,
New York City.
American Bonding Company of Baltimore,
16 Court Street,
Brooklyn, New York.
Central Park Properties, Inc.,
1359 Broadway,
New York City.

2195 RE: Bond #526651, Central Park Properties, Inc., Fidelity & Deposit Company of Maryland & American Bonding Company of Baltimore to The Prudence Company, Inc., premises south side of 59th Street 100' east of Seventh Ave., Borough of Manhattan, New York City.

Gentlemen:

In accordance with our letter of the 14th inst., we beg to advise that the following is a schedule of the work remaining to be completed in and on the
2196 building located on the south side of 59th Street, 100 feet east of 7th Avenue, New York City, covered by your said bond:

1. WATERPROOFING:

All waterproofing is to be completed, particularly the installation of a membrane waterproofing in the incinerator room and elevator pits.

2. ORNAMENTAL IRON & BRONZE: 2197

All ornamental iron and bronze work is to be completed. There is a grill missing in the vestibule on the first floor, and there are two transoms over store doors on the 58th Street side still to be put in. The bronze screen doors opening into the dining room and lobby, etc. are not properly adjusted, and this should be done.

3. MASONRY:

The masonry work is still incomplete, and the terra cotta copings are incomplete on the offset roof. 2198

4. PLUMBING:

All plumbing work should be completed. There are no shower curtains in the building, and there are still several fittings such as soap dishes, valves, etc., which have not yet been installed. There are several plumbing fixtures which were damaged and should be replaced.

5. ELECTRIC WORK:

The electric work is still incomplete. There are many receptacles, switches, plates and fixtures still to be installed, and the lighting, fire alarm systems, etc. have not yet been tested. 2199

6. ELEVATORS:

All elevator work is to be completed so that the elevators are in running order and entirely completed.

2200 7. SHOWER DOORS:

There are several pieces of moulding in connection with the shower doors which have not yet been installed.

8. METAL WINDOWS:

The installation of metal windows is incomplete where two double hung windows are adjoining each other, no caulking of any kind has been put in the joints. Glazing beads will have to be replaced where necessary. Some of the hardware on the casement doors leading to offset roofs, and on
2201 the windows are missing and will have to be put in.

9. GLASS:

All broken glass and all missing glass throughout the building should be replaced and installed. There are still several mirrors in the mirror doors missing, and also several defective mirrors in mirror doors should be supplied with perfect mirrors.

10. SHEET METAL WORK & ROOFING:

2202 All roofing work is to be entirely completed and all work previously done is to be gone over carefully for leaks. Louvres should be installed in the top of the incinerator flue. Some roofing on offset at the second floor level on the east side should be completed. There is also an opening between the new and the adjoining building from the second to the twelfth floor which should be flashed.

11. CEMENT WORK:

2203

All cement work is to be finished. No cement floor or base has yet been installed in the east store on 58th Street. This work should be done. No carpet stripping has been installed in any part of the building. Carpet stripping should be installed in all rooms and places where carpet is to be used.

12. CABINET WORK IN LOBBY:

The cabinet work in the lobby was never finished in that it was never waxed and rubbed down. For this reason, moisture got into the wood and several pieces have warped so badly that they will need repairs.

2204

13. DOORS:

All doors are to be completed throughout the building. There are some double acting doors to be hung in the duplex apartments, and there are some imperfect and damaged doors on the lower floors which will have to be replaced. The final adjustments on all doors have never been made.

14. PLASTERING:

2205

All plastering is to be finished. There is still a good deal of plaster patching to be done throughout the building, and there is still plaster work to be finished in the stores.

15. CARPENTRY FINISH:

All carpentry work is to be finished. In some of the rooms the panel moulding has not been finished, or has been so badly damaged in being put up that it will have to be replaced.

2206 16. FINISHED HARDWARE:

All hardware is to be finished and all locks are to be completed throughout the building, and furnished with keys. There are some lock sets still to be installed in the duplex apartments. The keys to all locks should be sorted out on a suitable key board, and there should be master keys for the respective floors, service portions, etc. together with grand master key for the whole building. Also some of the closets have never received clothes hooks and poles.

2207 17. INTERIOR MARBLE:

The marble work in the lobby is still to be cleaned.

18. TILE WORK:

There is still some tile work to be done, such as patching around switch plates, etc. and the completion of the installation of tile accessories.

19. TERRAZZO:

2208 All of the terrazzo of the main lobby, etc., on the first floor has yet to receive its final rubbing and polishing.

20. APARTMENT ICE BOXES:

All the refrigerators will have to be put in perfect working condition and completely furnished with proper accessories.

21. PAINTING:

All painting work is to be finished. All apartment rooms are to receive three coats of stipple finish on walls. All elevator ves-

tibules are to receive three coats of stipple finish also. All cement stair landings and treads will have to be finished with two coats of cement paint; dado stripe on all stairs; exposed fascias and portions of elevator shafts to receive one coat of asphaltum; cellar work two coats; three coats of enamel finish on walls and ceiling of all baths, pantries, kitchens, doors, trim, windows, cement base, etc.; three coats in closets; kalsomine all ceilings except baths and pantries; all necessary signs required by law, floor numbers on all elevator and stair shafts; apartment numbers on all apartments; all service rooms to be suitably lettered. Deduct for work previously completed, for example the walls of most rooms have received two coats and at present they would have to be sparkled, then receive one coat of size and one coat of stipple finish. There is also a good deal of painting work and kalsomining work which has been poorly and unsatisfactorily done, such work will have to be redone. Parts of the main lobby etc. will have to be touched up and the cabinet wainscoting will have to be waxed and rubbed down. 2209 2210 2211

22. Wood Floors:

The wood floors in the duplex apartments, main dining room and smaller dining rooms have opened up in some cases and will have to be gone over and also receive their finish coat of varnish and be protected with paper. All wood floors are to be completed.

23. Lighting Fixtures:

All lighting fixtures are to be completed and all broken fixtures are to be replaced.

2212 24. MAIN KITCHEN EQUIPMENT & REFRIGERATING PLANT:

The main kitchen equipment and the refrigerating plant are to be entirely completed, and the refrigerating plant put in running order.

25. MEDICINE CABINETS:

All missing medicine cabinets are to be installed, and all damaged boxes, mirrors and missing glass shelves are to be supplied and replaced.

2213 26. KITCHEN CABINETS:

All kitchen cabinet work is to be completed. There are some drain boards missing and closure pieces on top of hanging closets are to be installed.

27. MISCELLANEOUS:

All the necessary cleaning and removal of rubbish should be done. The steam, water and drainage systems should be tested for leaks.

2214 The foregoing specification represents all of the unfinished items which have come to our attention up to the present time, but if further inspection discloses additional uncompleted work we shall of course promptly advise you thereof.

Please make the necessary arrangements to have all of this work promptly completed, taking special care to have the work of the high grade and quality required on this job.

Plaintiff's Exhibit 66

Our engineering department will be glad to confer with you at any time in connection with your execution of such work. 2215

Very truly yours,

G. S. BRAISLIN
Vice-President.

G/N

Plaintiff's exhibits for identification numbered 63, 64 and 65, consisting of reports and estimates by Mr. Billsborrow, were marked in evidence as Defendant's Exhibit B of May 8, 1934, and are printed at pages 819 *et seq.* 2216

Plaintiff's Exhibit 66.

[LETTERHEAD OF THE PRUDENCE COMPANY, INC.]

March 31st, 1931.

Fidelity & Deposit Company of Maryland,
55 Liberty Street,
New York City.

Attention: Legal Department.

American Bonding Company of Baltimore, 2217
16 Court Street,
Brooklyn, New York.

Attention: Mr. Allan Major Race, Manager
Contract Department.

RE: Bond #526651, Central Park Properties, Inc., Fidelity & Deposit Company of Maryland & American Bonding Company of Baltimore to The Prudence Company, Inc., premises

Plaintiff's Exhibit 66

2218 south side of 59th Street, 100'E. of Seventh Avenue, Borough of Manhattan, New York City.

Gentlemen:

Bing and Bing, Inc. is starting a survey to determine the exact amount of work still to be done in the above building. This survey will start tomorrow morning, April 1st, 1931. We should be glad if you would have one of your representatives at the building beginning tomorrow, so that he can check this survey as it goes along, and so that you can make any survey of your own which
2219 you may desire. Mr. Lukach, of Bing and Bing, Inc., is in charge of this survey.

Very truly yours,

G. S. Braislin
Vice President.

Original of the above letter received March 31st, 1931.

American Bonding Company of Baltimore
By Allan Major Race

2220

Plaintiff's Exhibit 67.

REGISTERED 2221

April 11th, 1931.

Fidelity & Deposit Company of Maryland,
55 Liberty Street,
New York.
American Bonding Company of Baltimore,
16 Court Street,
Brooklyn, New York.
Central Park Properties, Inc.,
1359 Broadway,
New York City.

RE: Bond #526651, Central Park Properties, Inc., Fidelity & Deposit Company of Maryland & American Bonding Company of Baltimore to The Prudence Company, Inc., premises south side of 59th Street 100′ east of Seventh Av., Borough of Manhattan, New York City. 2222

Gentlemen:

We have not received any reply from you to our letters of February 14th and 25th, 1931, notifying you of work to be performed and materials to be furnished so as to complete the building on the above described property and demanding that you complete the building accordingly. 2223

By reason of your failure to reply to our letters or go ahead with the work although more than six weeks have elapsed since our notice of February 25, 1931, we assume that you have decided not to proceed with the work. Therefore, we are writing this letter to advise you that in accordance with the terms of your said bond, we

Plaintiff's Exhibit 67

2224 shall proceed with the work and complete the building, and in due course make claim upon you to reimburse us for all of our costs, expenses and charges in connection therewith, and interest. We have engaged Bing and Bing, Inc, to superintend the completion of the building. Please advise if you wish to have a representative present during the progress of the work.

Very truly yours,

G. S. Braislin
Vice President.

2225 [Registered receipts of letter of April 11th, 1931, to Central Park Properties, Inc. and Fidelity & Deposit Company of Maryland were attached to this Exhibit.]

2226

Plaintiff's Exhibit 68.

[Letterhead of Fidelity and Deposit Company of Maryland] 2227

June 10, 1931.

The Prudence Company, Inc.
331 Madison Ave. at 43rd St.
New York City

Re: Central Park Properties, Inc.

Gentlemen:

We acknowledge receipt of your letter of June 9th, 1931, enclosing itemized estimate of the work to be performed and materials to be furnished, 2228 which you say are necessary to complete the building at 59th Street and Seventh Avenue, formerly known as Seville Towers and now known as Essex House.

Yours very truly,

Albert E Hart
Albert E. Hart
Attorney

AEH:LW

Plaintiff's Exhibit 69, a letter from American Bonding Company to The Prudence Company, Inc., dated June 10, 1931, and identical with Exhibit 68, is omitted from the printed record, pursuant to stipulation and order (*supra*, p. 565) subject to the right of either party to submit the same to the Court if so advised. 2229

Plaintiff's Exhibit 70.

2230 (Copy)

Registered

June 24, 1931.

Fidelity & Deposit Company of Maryland,
55 Liberty Street,
New York City.
American Bonding Company of Baltimore,
16 Court Street,
Brooklyn, New York.
Central Park Properties, Inc.,
1359 Broadway,
New York City.

2231

Re: Bond #526651, Central Park Properties, Inc., Fidelity & Deposit Company of Maryland and American Bonding Company of Baltimore to The Prudence Company., prem. south side of 59th Street 100' east of 7th Ave., Borough of Manhattan, New York City.

Gentlemen:

Supplementing our previous letters to you in the above matter dated February 14th and 25th,
2232 1931, April 11th, 1931 and June 9, 1931, we find that there are certain additional items to be included in our notice of claim and we shall furnish you with particulars in the very near future.

Very truly yours,

G. S. Braislin (Sgd.)
Vice-President.

Plaintiff's Exhibit 71.

(Copy) 2233

June 9, 1931.

Fidelity & Deposit Company of Maryland,
55 Liberty Street,
New York City.
American Bonding Company of Baltimore,
16 Court Street,
Brooklyn, New York.
Central Park Properties, Inc.,
1359 Broadway,
New York City.

Re: Bond #526651, Central Park Properties, Inc., Fidelity & Deposit Company of Maryland and American Bonding Company of Baltimore to The Prudence Company, Inc., prem. south side of 59th Street 100' east of 7th Ave., Borough of Manhattan, New York City. 2234

Gentlemen:

Supplementing our letters to you of February 14th and 25th, 1931, and April 11th, 1931, we enclose herewith itemized estimate of work to be performed and materials to be furnished, with the estimated cost thereof, to complete the construction of the building known as Essex House, located on the south side of 59th Street, 100 feet east of Seventh Avenue, New York City, covered by your said bond. The estimated cost as shown by the statement is the sum of $279,595.01. As we advised in our letter of April 11th, Bing & Bing, Inc., are superintending this work of completion. 2235

It will be necessary for us to cause other work to be done in completing the building, resulting

2236 in certain changes from the original plans and specifications, but the cost of that work is not included in the within itemized estimate. Such additional work may be fairly considered as contemplated by the provisions of paragraph "Fifth" of your bond, but we have not yet estimated its cost.

Among other things your bond provided that the building should be completed not later than the 16th day of December, 1930, and by reason of the fact that it was not completed at that time, we have sustained further substantial loss and damage, the amount of which has not yet been
2237 computed.

We shall advise you as soon as we have calculated the amount of such additional cost, loss and damage.

We are delivering a copy of the within estimate to Keeler, Inc., of 420 Lexington Avenue, pursuant to your instructions.

Please acknowledge receipt of this letter, and oblige,

Very truly yours,

G. S. Braislin
Vice-President.

2238

Blue Prints		$300.00
Carpentry		
Kellastone carpet strips	$8,450.00	
Labor for installing missing picture moulding, base moulding, shelving, door bumpers, hooks, etc.	1,325.60	
Material for above	200.00	
	$9,975.60	9,975.60
Cement Work		
Labor for patching floors, base, steps etc. where omitted or broken	450.00	
Material for above	75.00	
	$525.00	525.00

Electric			2239
Charts in each panel box	300.00		
Fuses, missing plates, inspection etc.	750.00		
Fire alarm system, cards, frames, recording, etc.	300.00		
Fountain reflectors	50.00		
Unfinished work in barber shop	250.00		
	$1,650.00	1,650.00	
Elevators			
Finishing contract	$14,500.00		
Removing equipment to waterproof pits	380.00		
	$14,880.00	14,880.00	
Fireproof Windows			
Missing stools and trim	1,700.00		
Weatherstripping	1,575.00		
Repairing casement windows	250.00		2240
	$3,525.00	3,525.00	
Fireproof Doors and Bucks			
Repairing and supplying missing bucks and doors	1,300.00		
Elevator door stops	518.00		
New doors and bucks in duplex apartments	115.00		
Copper doors for exterior openings	480.00		
Glazing beads	75.00		
	$2,488.00	2,488.00	
Fireproof Arches			
Fireproofing steel in bulkhead	$100.00		
Fireproofing steel in plenum chamber	700.00		
Fireproofing steel in 20th floor elevator machine room	100.00		
	$900.00	$900.00	2241
General Equipment			
Lockers—Mezzanine		600.00	
Glass			
Breakage	341.56		
Missing mirrors	880.00		
Glass in doors	160.00		
	1,381.56	1,381.56	

NOTE: Plate glass in bronze 1st floor grilles included in bronze work.

2242 *Hardware*

For making master keying system for entire building	1,200.00	
Missing hardware	390.00	
Missing coat hooks	150.00	
	1,740.00	1,740.00

Iron (Ornamental)

Vault door	300.00	
Access doors	255.00	
Coat bars	50.00	
Service entrance gate	600.00	
Incinerator room platform, railings, etc.	300.00	
Missing ladders, etc.	75.00	
	$1,580.00	1,580.00

Lighting Fixtures

2243 Missing fixtures in the following locations:

Bathrooms	80.25	
Living rooms and chambers	542.00	
Corridors and halls	106.50	
First floor	850.00	
	$1,578.75	1,578.75

Marble

First floor—marble to be installed instead of terrazzo	3,889.50	
Missing saddles	52.50	
	$3,942.00	3,942.00

Masonry

Parging bulkhead roof	$60.00	
Pointing up of brickwork	160.00	
Missing terra cotta caps	125.00	
2244 Columns not fireproofed	600.00	
Bulkheads in stores	60.00	
Uncompleted masonry in barber shop	200.00	
Pointing of west wall of Hotel Meurice	750.00	
	$1,955.00	$1,955.00

Miscellaneous

Cleaning—Windows	925.00	
Toilets	300.00	
Rubbish—stores 1st floor, etc.	500.00	
	$1,725.00	1,725.00

Dampproofing and Waterproofing			2245
Window caulking	875.00		
Elevator pits	225.00		
Waterproofing under main house tank, 2nd bulkhead	250.00		
Spandrel leaks	400.00		
	$1,750.00	1,750.00	
Electric Current			
6 months at $700.00 per month		4,200.00	
Incinerator			
Insulating ceiling of incinerator room	400.00		
Insulating of incinerator breeching	200.00		
Tools	125.00		
Trolley beam and block	175.00		
	$900.00	900.00	
Kitchen Equipment			2246
Missing parts, adjusting, etc.		500.00	
Mail Chute			
Amount due Cutler Mail Chute Company required before opening chute		4,000.00	
Medicine Cabinets			
Missing shelves, mirrors, broken doors, etc.		115.00	
Soundproofing			
Elevator machine room—21st floor		400.00	
Telephone			
Office telephones—6 mos. at $80.00 per Mo.	480.00		
Switchboard rental 6 mos. at $274.00 per month	1,644.00		2247
	$2,124.00	2,124.00	
Wire Guard			
Machinery in basement		$400.00	
Cork Floors			
40th floor hall		275.00	
Painting		90,800.00	
Plant Ventilation			
Two additional sections for air filter and charging and cleaning tanks	$100.00		
Minor parts, adjusting, etc.	200.00		
	$300.00	300.00	

2248 *Refrigeration*

(Cork covering	200.00	
(Adjusting, etc.	200.00	
Ammonia (Gas mask & cabinet	60.00	
Machine (Missing parts	100.00	
Electrolux—missing parts	400.00	
	$960.00	960.00

Plastering

Patching	3,500.00	
Uncompleted barber shop	750.00	
	$4,250.00	4,250.00

Plumbing

Replacing missing fittings, defective fixtures, seats, etc.	$1,000.00	
Shower Curtains	1,374.00	
2249 House tank discharge line	50.00	
Gas shut off valve	150.00	
Pressure guages—water meter	50.00	
Check valve—water meter	125.00	
Guages—discharge of house pump	100.00	
Liquid soap dispenser	300.00	
Armored hose for ice tank	34.85	
Installing soap dishes	150.00	
Fire extinguishers	300.00	
Two Siamese connections	100.00	
Five lavatories omitted in barber shop	625.00	
Drain in incinerator room	150.00	
Valve charts	300.00	
	$4,818.85	$4,818.85

Roofing

Felt and pitch omitted	500.00	
Patching	125.00	
2250	$625.00	625.00

Steamfitting

Radiators omitted in stores	700.00	
Missing equipment, etc.	45.25	
Valve charts and brass tags	375.00	
One year's supply of guage charts	25.00	
Insulating ceiling of steam room	400.00	
Radiators in interior bathrooms	25,000.00	
Patching and cutting for above	17,000.00	
Rubbish chute	4,500.00	
	$48,045.25	$48,045.25

Stone (Cleaning)	2,000.00
Terra Cotta—Missing pieces	75.00

Tiling			2251
Barber shop (floor and wall)	$7,327.00		
Patching	50.00		
Accessories (Combination soap, glass and tooth brush holders)	1,030.00		
Accessories (servants rooms)	136.50		
Miscellaneous accessories	50.00		
	$8,593.50	8,593.50	
Kitchen Cabinets			
Missing equipment, repairing existing equipment, etc.		350.00	
Bronze Work			
Missing bronze grilles, screens and plate glass for same on 1st floor	3,620.00		
Repairing existing work	110.00		
	$3,730.00	3,730.00	2252
Terrazzo			
Polishing first floor terrazzo	1,053.78		
Patching	140.00		
	$1,193.78	1,193.78	
Cabinet Work			
Removing warped wainscot and replacing	400.00		
Work omitted in check room	150.00		
Racks and shelves in newstand	210.00		
Room clerks office—mail and key racks, shelving, etc.	430.00		
File racks and wood screens	320.00		
Telephone room—counter and 'phone booths	550.00		
Private dining rooms—wood folding doors	1,158.00		
	$3,218.00	3,218.00	2253
Wood Floors			
Refinishing wood floors on 1st floor and in duplex apartments		$400.00	
Salaries			
Project Manager, Construction Superintendent, Assistants, laborers, Watchmen, Engineers, Elevator Operators, porters, etc. for six months		21,408.00	
		$254,177.29	
Bing & Bing, Inc—Builders and Superintendence fee, 10%		25,417.72	
TOTAL		$279,595.01	

Plaintiff's Exhibit 72.

2254 (Copy)

July 6, 1931.

Fidelity & Deposit Company of Maryland,
55 Liberty Street,
New York City.
American Bonding Company of Baltimore,
16 Court Street,
Brooklyn, New York.
Central Park Properties, Inc.,
1359 Broadway,
New York City.

2255 Re: Bond #526651, Central Park Properties, Inc., Fidelity & Deposit Company of Maryland and American Bonding Company of Baltimore to The Prudence Company, Inc., prem. south side of 59th Street 100′ east of 7th Ave., Borough of Manhattan, New York City.

Gentlemen:

In accordance with our letter of the 24th ult., enclosed herewith please find schedule of further items aggregating in amount $138,043.77 to be added to our previous claim filed with you in the 2256 sum of $279,595.01, making a total claim of $417,638.78.

We are forwarding a copy of the within schedule to Keeler, Inc., of 420 Lexington Avenue.

Kindly acknowledge receipt of this letter and oblige,

Very truly yours,

G. S. Braislin
Vice-President.

Wood stools and aprons were omitted from 2,335 metal windows in rooms from 2nd to 40th floors, incl. which were specified on page 11, par. 39 of the Carpentry & Millwork specification.		2257
2,335 fireproofed wood stools & Aprons at $4.00 erected	$9,340.00	
Metal stools & aprons at $1.80 each, erected	4,203.00	
Difference	$5,137.00	
An allowance of $250. was made on page 9 of the Preliminary and Miscellaneous Work specification for each fireplace mantle for each living room from the 18th to 38th floors, incl, 144 in all, and $250. each for the four mantles on the 39th floor. All of these fireplace mantles were omitted making a saving of	$22,600.00	
Cement bases with wood cap moulding were substituted for the 6" one piece wood base specified on page 10, Par 33 of the Carpentry & Millwork Specification, and on the schedule of interior finish for 574 foyers, 444 living rooms, 681 bed rooms and 473 serving pantries from the 2nd to 40th floors, incl.		2258
6" cement base with wood moulding, per ft. 18¢		
6" one member fireproofed wood base, per ft. 35¢		
Estimated lineal feet, 78,388 at 17¢		
Difference	$13,325.96	
Paragraph 20 on page 10 of the Plastering specification and schedule sheet #14 calls for wainscot of Keene's cement 4' 6" high, in all service elevator vestibules and lobbies throughout the building.		
No Keene's cement wainscots were put in any of these spaces		
1222 yards at $4.77 (removing existing plaster and applying Keene's cement).....	5,828.94	2259
Ceilings of terraces on the 39th floor were left unfinished having only the scratch coat applied.....	160.00	
Teak and burl wall panelling was omitted from behind the desk space, cashier's space and news and ticket stand	2,940.00	
Four counter screens of burl and ebony were omitted from counters of desk space in main entrance lobby	300.00	
Copper Louvres and screens were omitted from the main stack on the main bulkhead roof	280.00	
Brick costing $33.00 per thousand was used instead of the $38.00 per M specified on page 3, par. 5 of the Masonry specification. 1,300,000 Continental Fiske brick used at $33.00 per thousand.		
Difference in cost	6,500.00	

2260 $50,000.00 allowance was made for lighting fixtures, installation, connection and inspection fees.

Allowance for lighting fixtures.....		$50,000	
Actually spent—Lightolier Company	$14,500		
Black & Boyd	8,600	23,100	
Difference			$26,900.00

Following allowances were made in the original specifications all of them in our opinion being in excess of the monies spent for the various items.

Hardware allowance		$50,000	
Contract-Rosenthal Hdw. Co.		20,500	
Difference			29,500.00
Medicine Cabinet Allowance		10,000	
Contract		5,930.56	
Difference			4,069.44

2261

Apartment Refrigerators allowance		70,000	
Electrolux Contract (Consolidated Gas Company)		62,047	
Difference			7,953.00
			$125,494.34
Bing & Bing, Inc. Builders & Superintendence Fee—10%			12,549.43
TOTAL			$138,043.77

The above item is in addition to the amount of $279,595.01 as listed in previous report.

June 30, 1931.

2262 [Registered receipts of letter of July 6, 1931, to Fidelity and Deposit Company of Maryland, and Central Park Properties, Inc., were attached to this Exhibit.]

Plaintiff's Exhibit 73.

[Letterhead of Fidelity and Deposit Company of Maryland] 2263

July 8, 1931

Registered Mail
Return Receipt Requested

The Prudence Company, Inc.
162 Remsen Street
Brooklyn, N. Y.

Attention: Mr. G. S. Braislen,
Vice-President

Re: Central Park Properties, Inc.

Gentlemen: 2264

I am in receipt of your letter of July 6th, wherein you advise us of an additional claim under the bond for the above named principal, in the sum of $138,043.77.

Kindly advise me why you advanced to the Central Park Properties, Inc. all but $75,000.00 on their building and loan agreement had with you, when you now claim there is still over $417,000.00 worth of work still to be done.

Yours very truly,

Albert E Hart 2265
Albert E. Hart
Attorney

AEH:LW

Plaintiff's Exhibit 74, letter from American Bonding Company to The Prudence Company, Inc., dated July 8, 1931, identical with Exhibit 73, is omitted from the printed record, pursuant to stipulation and order (*supra*, p. 565) subject to the right of either party to submit the same to the Court if so advised.

Plaintiff's Exhibit 75.

2266 [Letterhead of American Bonding Company of Baltimore]

September 3, 1931

Registered Mail

Return Receipt Requested

The Prudence Company, Inc.
162 Remsen Street
Brooklyn, N. Y.

Attention: Mr. G. S. Braislen,
Vice-President

2267 Re: Central Park Properties, Inc.

Gentlemen:

Under date of July 8th, I forwarded a letter to you by registered mail, a copy of which is hereto attached, wherein I requested of you a statement as to why you paid to the Central Park Properties, Inc., under your building and loan agreement, all but $75,000.00, when you now claim there is still over $417,000.00 worth of work still to be done.

I would be pleased to have a written explanation of this before discussing any further features
2268 of this case.

Yours very truly,

Albert E. Hart
Albert E. Hart
Attorney

AEH:LW
Enc.

Plaintiff's Exhibit 76.

2269

This CERTIFIES that CENTRAL PARK PROPERTIES, INC. has deposited with THE PRUDENCE COMPANY, INC., the sum of SEVENTY-FIVE THOUSAND ($75,000) DOLLARS, which sum shall be held by The Prudence Company, Inc. without interest until all the work of completing the building on premises on the south side of 59th Street, 100 feet east of Seventh Avenue 206 feet 4 inches in width along 59th Street, extending through to the northerly side of 58th Street, except the final coat of paint, has been completed to the satisfaction of The Prudence Company, Inc.

2270

The Prudence Company, Inc. is authorized and empowered at any time (but there is no obligation so to do) to apply said moneys so deposited, or any balance thereof remaining in its hands, on account of any interest or principal becoming due on the consolidated mortgage for $6,650,000 held by The Prudence Company, Inc. covering the premises above referred to, and as to any moneys not so applied, Central Park Properties, Inc. shall be entitled to receive the balance, except $25,000, when the building above mentioned has been fully completed to the satisfaction of The Prudence Company, Inc., except said final coat of paint, and

2271

when said final coat of paint is completed, said balance if not theretofore applied as above, shall be paid to said Central Park Properties, Inc.

This certificate does not, nor shall it be construed to in any way vary, change or alter the terms of the consolidated mortgage above mentioned and/or the bonds securing the same.

Dated New York, December 5th, 1930.

THE PRUDENCE COMPANY, INC.,
By: ALEXANDER JOHNSTON

2272 Plaintiff's Exhibits 77, 78, 79, 80, 81, 82 and 83, consisting of cancelled checks and receipts for various payments made by The Prudence Company, Inc., in the completion of the building, are omitted from the printed record, pursuant to stipulation and order (*supra*, p. 565) subject to the right of either party to submit the same to the Court if so advised.

Plaintiff's Exhibit 84.

5/7/34

SCHEDULE A (Revised)

2273 Payments made by The Prudence Company, Inc., in completing the building, and claimed to be chargeable against the Surety Company.

Note as to key numbers:
Arabic numbers refer to schedule annexed to complaint; roman numerals refer to paragraphs of the complaint.

Key No.	*Description of Item*			*Amount*
1	BLUE PRINTS			
	T Square & Triangle Co.		$20.38	
	Permanent Print Corporation		3.34	$23.72
38	BRONZE			
	(a) Bronze screens between entrance lobby and dining room and between entrance foyer and lounges		$1,350.00	
	(b) Installing 2 radiator grills in 59th Street vestibule		20.00	
2274	(c) Straightening bronze doors to ballroom		44.35	1,414.35
2	CARPENTRY			
	(a) Labor—Finkelstein & Padowitz, Inc.		$1,031.67	
	(b) Trim bills—			
	Lockwood Manufacturing Company	$3.60		
	C. A. Hasbrouck & Son	124.72		
	Bell Brothers Lumber Co.	22.00	150.32	1,181.99
3	CEMENT WORK			
	(a) Labor on patching		$27.38	
	(b) Materials		11.25	
	(c) V. Foscato, leveling Cement floors		608.00	646.63

Schedule A (Revised)

Key No.	*Description of Item*		*Amount*	
17	DAMP-PROOFING AND WATERPROOFING			2275
	(a) Window caulking—Hydro-Bar Corporation	$875.00		
	(b) Waterproofing elevator pits, S. E. Stott & Co.	225.00	1,100.00	
4	ELECTRIC			
	(a) Missing parts—			
	Cranell, Nugent & Kranzer, Inc.	$380.86		
	Rialto Electrical Co.	8.40		
	(b) Henrich Reflector Co. Inc. for fountain reflectors	40.50		
	Rialto Electrical Co., for installing same	3.50		
	(c) Frames for fire alarm system cards, New York Frame & Picture Co.	21.60	$454.86	
18	ELECTRIC CURRENT			2276
	Paid to United Electric Light & Power Company for periods:			
	Dec. 3, 1930 to Feb. 6, 1931	$882.36		
	Feb. 6, 1931 to Mar. 5, 1931	175.44		
	Mar. 5, 1931 to Apr. 4, 1931	278.64		
	Apr. 4, 1931 to May 5, 1931	573.44		
	May 5, 1931 to June 4, 1931	834.56		
	June 4, 1931 to July 6, 1931	1,202.32		
	July 6, 1931 to Aug. 4, 1931	1,137.12	5,083.88	
5	ELEVATORS			
	To Otis Elevator Company for:—			
	(a) Finishing work according to original contract with Central Park Properties, Inc.	$14,500.00		
	(b) Removing and re-installing pit equipment to permit waterproofing of elevator pits	395.00	14,895.00	
6	FIREPROOF WINDOWS			2277
	(a) Missing stools and trim—Chapman Metal Products Co. Inc.	$1,551.60		
	(b) Adjusting and repairing casement windows and doors—S. H. Pomeroy & Co. Inc.	125.00	1,676.00	
7	FIREPROOF DOORS AND BUCKS			
	(a) Materials for repairing doors Reliance Bronze & Steel Corporation	$22.50		
	(b) Moulding for mirrors on doors —Roselait Building Corporation	25.60	48.10	
9	FLOORS			
	(a) Scraping and finishing ballroom floor and platform—Builders' Wood Flooring Co.		210.00	

Schedule A (Revised)

	Key No.	*Description of Item*		*Amount*
2278	10	GLASS		
		(a) Replacing mirrors and glass E. Ossias	$1,431.40	
		(aa) Black glass for bronze grill in lobby—E. Ossias	175.00	
		(b) Hammond - Rough glass for bronze screen, first floor—Schwartz & Glasser	74.25	
		(c) Replacing broken lights—Marks Bros. Inc.	345.26	2,025.91
	11	HARDWARE		
		(a) Making master keying system, supplying missing keys and repairing locks—O'Byrne & Russell	$192.90	
		(b) 240 door stops—O'Bryne & Russell	48.00	
2279		(c) Missing hardware—Rosenthal Hardware Co.	508.70	
		(d) Amount paid to Rosenthal Hardware Co. for unattached hardware left in building when taken over	406.01	
		(e) 25 gross hat and coat hooks—Lockwood Manufacturing Co.	150.00	1,305.61
	19	INCINERATOR		
		Firing-tools for destructor Stanton-Murray Corp.		25.00
	XXXVII			
	(7)	INSURANCE		
		Apportioned for period ending October 1, 1931—Remsen Brokerage Co. Inc.		1,640.87
	12	IRON (Ornamental)		
2280		(a) Access doors—Ray-Daisley & Co.	$24.00	
		Karp Metal Products Co.	60.42	
		(b) Miscellaneous iron work: Gottleib Iron Works	275.00	
		Aetna Iron Works	275.00	634.42
	37	KITCHEN CABINETS		
		Missing hardware—White Door Bed Company		53.01
	20	KITCHEN EQUIPMENT		
		Repair work—Duparquet, Hout & Moneuse Co.		295.00

Schedule A (Revised)

Key No.	Description of Item		Amount	
				2281
13	LIGHTING FIXTURES			
	(a) Fixtures purchased to make up for missing fixtures—Shapiro & Aaronson, Inc.	$598.00		
	(b) Fixtures purchased from Lightolier Co. to make up for missing fixtures	321.20	919.20	
27	PAINTING			
	(a) Completing painting according to original plans and specifications as per contract April 27, 1931 Landsman Bros. & Soffin	$71,650.00		
	(b) Recalcimining 154 ceilings at $8.00	1,232.00	72,882.00	
				2282
41	PAYROLL			
	(a) Bing & Bing employees	$12,222.10		
	(b) Elevator operators	2,236.66		
	(c) Porters	2,495.82		
	(d) Watchmen	2,080.35		
	(e) Labor for steam maintenance	1,225.70	20,260.63	
30	PLASTERING			
	(a) Labor in plaster patching	$436.80		
	(b) Material	55.00	491.80	
31	PLUMBING			
	(a) 687 shower curtains at $2. each, Acme Curtain Co. (Note: Rayon taffeta curtains at $2.40 each were installed but plumbing specifications called for white duck and only $2. each, estimated fair price for white duck is claimed)	$1,374.00		
	Shower curtain pins, Acme Curtain Company	362.73		2283
	(b) Missing parts:			
	Moylan Supply Company	155.90		
	Charles H. Darmstadt, Inc.	6.00		
	(c) Patching and polishing bath tubs Burnstide Plumbers' Supply Co.	28.00		
	(d) Missing exterior bronze plates Murray & Sorenson, Inc.	30.00	1,956.63	
29	REFRIGERATORS			
	(a) Gas mask and cabinet—A. T. Miller Supply Co.	$21.78		
	(b) Repairing compressor—Voss Ice Machine Works	424.71		
	(c) Missing parts for Electrolux boxes in serving pantries—Consolidated Gas Co. of N. Y.	30.14	476.63	

Schedule A (Revised)

	Key No.	*Description of Item*		*Amount*
2284	32	ROOFING AND SHEET METAL		
		(a) Repairing terrace roof on 32nd floor—Premo Roofing Co. Inc.		54.26
	33	STEAMFITTING		
		Insulating of steam and incinerator ceilings — Asbestos Construction Co. Inc		700.00
	34	STEAM CONSUMPTION		
		Paid to New York Steam Corporation for periods:—		
		Dec. 20, 1930 to Jan. 6, 1931	$3,615.78	
		Jan. 6, 1931 to Jan 29, 1931	3,018.97	
		Jan. 29, 1931 to Feb. 28, 1931	4,107.72	
		Feb. 28, 1931 to Mar. 31, 1931	2,157.08	
		Mar. 31, 1931 to Apr. 30, 1931	381.31	
		Apr. 30, 1931 to May 29, 1931	161.46	
		May 29, 1931 to June 30, 1931	102.50	
2285		June 30, 1931 to July 31, 1931	102.60	13,647.42
		XXXVII		
		(4) SUPERVISION FEE FOR COMPLETION		
		Bing & Bing, Inc.		6,500.00
		XXXVII		
		(5) TAXES		
		First half of 1931		38,080.00
		XXXVII		
		(6) TAXES		
		Second half of 1931 (apportioned for period ending October 1, 1931)		19,040.00
	24	TELEPHONE		
		Paid to New York Telephone Company on bills dated:—		
		February 1, 1931	15.60	
		May 1, 1931	21.03	
		June 1, 1931	53.31	
2286		June 23, 1931	39.68	
		Estimated charges for July, August and September, 1931 (after installation of general switchboard) at $25. per month	75.00	204.62
	39	TERRAZZO		
		Polishing first floor terrazzo—V. Foscato		675.28
	16	MISCELLANEOUS		
		(a) Cleaning windows—Apartment House and Window Cleaning Company	$925.00	
		(b) Removing rubbish—		
		William Cox		
		19 loads at $7.50 per load; 78 loads at $7.00 per load	688.50	
		James E. Graham		
		40 loads at $7.00 per load	280.00	
		(c) Holmes Electric Protective Co.	502.11	2,395.61
		TOTAL		$210,999.73

Plaintiff's Exhibit 85.

2287

5/7/34

SCHEDULE B (Revised)

LABOR AND MATERIAL OMITTED BY CENTRAL PARK PROPERTIES AND NOT SUPPLIED BY THE PRUDENCE COMPANY, INC.; AND SUBSTITUTIONS BY THE CENTRAL PARK PROPERTIES, INC. OF MATERIALS INFERIOR TO THOSE CALLED FOR BY PLANS AND SPECIFICATIONS.

Key No.	*Description of Item*	*Amount*
38	BRONZE WORK	
	Bronze screens omitted from lobby floor.....	$1,650.00
	Glass for above	525.00
40	CABINET WORK	
	(a) Racks and shelving omitted in check room, 1st floor	150.00
	(b) Room Clerk's office, mail and key racks and shelving omitted	1,200.00
	(c) File racks and 4 wood screens on counters of desk space in main lobby omitted.....	550.00
	(d) Telephone room—counter and 6 phone booths omitted	1,350.00
	(e) Private dining rooms, 1st floor—wood folding doors omitted	1,158.00
2	CARPENTRY	
	(a) Kellastone carpet strips, 111,012 lineal feet at 6½¢ per lineal foot	7,215.00
	(b) Wood stools and aprons omitted from 2335 metal windows in rooms from 2nd to 40th floors inclusive Difference in cost between fire-proof wood stools and aprons and metal stools and aprons	5,137.00
	(c) Wood flooring omitted in private dining rooms	800.00
3	CEMENT BASE	
	Omission of sanitary cove in 25,472 lineal feet of cement base as shown by plans	2,037.76
43	CLOSETS	
	Omitted from servants' rooms—56 closets at $63.51 each (Gypsum blocks—Kalamein doors)	3,557.00
4	ELECTRIC	
	(a) Charts omitted from each panel box	300.00
	(b) Unfinished electrical work in barber shop (See electric plans)	250.00
21	MAIL CHUTE	
	Installed but not paid for; now in use under rental arrangement; cost, if not rented, would have been	4,000.00

2288

2289

Schedule B (Revised)

	Key No.	Description of Item		Amount
2290	22	MEDICINE CABINETS Difference between amount actually spent by Central Park Properties, Inc. for medicine cabinets, and amount called for in specifications as medicine cabinet expense		4,069.44
	27	PAINTING Difference between amount actually spent by The Prudence Company, Inc. to complete painting, and amount which would have been required to comply with plans and specifications, as shown by contract with Landsman Bros. & Soffin, dated April 27, 1931		19,150.00
	28	PLANT 2 additional sections for air filter and charging and cleaning tanks—specified but not furnished		100.00
2291	30	PLASTERING, FURRING AND LATHING (a) No plastering done in barber shop		713.00
		(b) Omission of Keene's cement wainscoting where called for by plans and specifications, 2392 square yards Difference in price between plaster and cement $1.00 per yard		2,392.00
	31	PLUMBING Items called for by specifications but never furnished or installed:		
		Perforated hush pipes in house tank discharging line	$50.00	
		Gas shut-off valve	150.00	
		Pressure gauge on water meter.....	50.00	
		6" check valve on water meter	125.00	
		Gauges on discharge of house pumps ..	100.00	
		Liquid soap dispenser system	300.00	
		2 Siamese connections.....	60.00	
		5 radiators in barber shop	625.00	
		Valve charts	300.00	1,760.00
2292	32	ROOFING AND SHEET METAL Amount demanded by Fordham Cornice Works (Central Park Properties' roofing contractor) to furnish guaranty called for by specifications		500.00
	44	ELEVATORS Reducing speed of express elevators from 700 feet to 600 feet per minute		2,840.00
	7	FIRE-PROOF DOORS AND BUCKS Iron Kalamein doors substituted for copper doors called for by specifications		200.00

Schedule B (Revised)

Key No.	*Description of Item*	*Amount*	2293
8	FIRE-PROOF ARCHES		
	Fire-proofing omitted on floor beams in 21st floor plenum chamber	200.00	
10	GLASS		
	(a) 681 bedroom mirrors—plain instead of beveled, as specified; cost of removing, beveling edges, resilvering and resetting, at $6.75 each	4,596.75	
12	IRON (Ornamental)		
	Vault door for book vault on 1st floor omitted	150.00	
13	LIGHTING FIXTURES		
	Difference between amount actually spent by Central Park Properties, Inc. for lighting fixtures, and amount specifications called for as lighting fixture expense	26,900.00	
16	MANTEL-PIECES		2294
	(a) 144 fire-places and mantel-pieces in living rooms from 18th to 38th floors, inclusive, for which specifications made an allowance of $150 each, omitted	21,600.00	
	(b) 4 fire-places and mantel-pieces on 39th floor, for which specifications made an allowance of $250 each, omitted	1,000.00	
14	MARBLE		
	Terrazzo border installed on lobby floor instead of marble border as called for by plans— Main dining room Dining terraces Palm and tea room and terrace Writing and fountain lounges	1,870.35	
33	STEAMFITTING		
	(a) 9 radiators omitted in all stores	700.00	
	(b) Valve charts and brass tags omitted	375.00	
	(c) One year's supply of gauge charts	25.00	
	(d) Radiators omitted in 568 interior bath rooms	25,000.00	2295
	(e) Cost of cutting and patching plaster and tile work to install same	17,000.00	
35	TERRA COTTA		
	(a) 13 caps missing from end piers on north and south terraces, first bulkhead	200.00	
	(b) Change in plans, without notice to The Prudence Company, Inc., to omit 25% of terra cotta on facade (estimated difference in cost)	12,416.00	
39	TERRAZZO		
	1395 square feet of terrazzo on 1st floor not polished, at 8¢ per square foot	111.60	

Schedule B (Revised)

2296	No. Key	Description of Item	Amount
	36	TILE	
		(a) Barber shop—floor and wall tile omitted..	2,022.00
		(b) Soap dishes installed over wash basins in 681 guest baths, instead of combination soap, glass and tooth brush holders	1,030.00
		(c) Fixtures omitted over lavatories in 56 servants' rooms	191.75
		Fee of general contractor or architect to supervise completion of above items—5% of total cost	8,849.63
		TOTAL.....	$185,842.28

Plaintiff's Exhibit 86.

2297 [LETTERHEAD OF A. E. LEFCOURT REALTY HOLDINGS.]

May 21st, 1929.

Mr. Frank Grad,
1023 Broad Street,
Newark, N. J.

Re:—59th St. C. P. So.

My dear Frank:—

A. E. asked me to look over the 59th Street proposition, and in order to do it, it will be necessary for me to have the approximate cubical contents and also the approximate square foot area, both to be of total, and also the height of the building.

2298

Will you kindly give me this information, and oblige

Sincerely yours,

LOUIS HAAS

LH:EB.

Plaintiff's Exhibit 87.

2299

[Letterhead of A. E. Lefcourt Realty Holdings.]

October 4th, 1929.

Frank Grad,
521 Fifth Avenue,
New York City.

Re:—Central Park Prop.

Dear Sir:—

We are enclosing herewith copy of list of amendments to the specifications as required by the Prudence Co.

2300

These are for your use and future reference.

Very truly yours,

Central Park Properties, Inc.
By L. Haas
Secretary.

EHK:LS K.

(The enclosure was a carbon copy of Plaintiff's Exhibit 6, amendments to specifications, dated September 24, 1929, and printed at page 673, *supra*.)

2301

Plaintiff's Exhibit 88.

2302

[Letterhead of A. E. Lefcourt Realty Holdings.]

April 7, 1930.

Frank Grad
521 Fifth Ave.
New York City.

Re: Central Park Properties
58th & 59th Sts.

Dear Sir:

Please be advised that in connection with the
2303 contract for the bronze work, the following items will be omitted from the contract:

1. Bronze screens on each side of the 59th Street entrance foyer.

2. Bronze screens to the breakfast and palm rooms.

3. Bronze screens to the stenographers' room.

4. Bronze screens to the fountain lounge.

5. Bronze saddle at dining check room.

Very truly yours,

2304

Central Park Properties, Inc.
By L. Haas
L

CWL:BS
(CC:Mr. Haas
Mr. Klein)

Plaintiff's Exhibit 89.

2305

REPORT

on the

ESSEX HOUSE
160-170 WEST 59TH STREET
NEW YORK CITY

July 6, 1931.

FRANK GRAD, ARCHITECT,
521 - Fifth Avenue
New York City.

2306

REPORT ON THE ESSEX HOUSE
160-170 WEST 59TH STREET

Following is a list of items which are at variance with the original specifications that were prepared for the Syndicate Subscription Corporation and dated May 31st, 1929.

The list includes items substituted for those specified, omitted, left unfinished or in need of repair at the time the 58-59 Realty Corporation took possession of the building.

* * *

Sec. 18

2307

1. Wood stools and aprons were omitted from 2,335 metal windows in rooms from 2nd to 40th floors, incls., which were specified on page 11, par. 39 of the Carpentry & Millwork spec.

Sec. 4

2. An allowance of $150. was made on page 9 of the Preliminary & Miscellaneous Work specification, for each fireplace mantle for each living room from the 18th to 38th floors, incl., 144 in all, and $250. each for the four mantles on the 39th floor. All of these fire-

2308

place mantles were omitted making a saving of $22,600.00.

Dr. # 10

3. T. C. caps omitted from buttresses bracing North wall at 41st floor.

Sec. 18
Dr. 14

4. Cement bases with wood cap moulding were substituted for the 6" one piece wood base specified on page 10 par. 33 of the Carpentry & Millwork Specification and on the schedule of interior finish for 574 foyers, 444 living rooms, 681 bed rooms and 473 serving pantries from the 2nd to 40th floors, incl.

2309 Sec. 18

5. Wood floors on 39th and 40th floors and on musician's platforms in main dining room and in breakfast room need to be scraped and finished as specified on page 7 par. 23 of the Carpentry & Millwork specification.

Dr. 14

6. Wood floors in private dining rooms omitted and finished cement floors installed instead.

Sec. 18
Page 7
Par. 23

7. Maple dance floor in main dining room needs to be scraped and finished as specified.

Sec. 18

8. Carpet strips as per page 9 par. 29 of the Carpentry & Millwork specification were omitted from all living rooms, bed rooms, foyers and corridors from 2nd to 40th floors, incl., and from dining room terraces, palm room, and writing and fountain lounge on the ground floor.

2310

Sec. 18
Dr. 14

9. Chair rails as per Carpentry & millwork specification, page 11 par. 35, was omitted from the cashiers' office, manager's office and assistant-manager's, public stenographer's room, main dining room and dining terraces and private dining rooms.

Sec. 18 Page 11 Par. 34

10. Picture moulding and base moulding omitted in several places in the building where same were specified. 2311

Sec. 18

11. Folding partitions as specified on page 9 par. 30 of the Carpentry and Millwork specification omitted from private dining rooms on the ground floor.

Sec. 17

12. All exterior windows and doors throughout the building were left uncaulked. Caulking specified on page 5 par. 10 of the Waterproofing & Caulking specification.

Sec. 10 Page 14 Par. 19

13. Stone work needs to be cleaned down. 2312

Sec. 9 Page 7 Par. 15

14. The sanitary cove which was detailed on drawing #14 was omitted from all cement bases including bases, which were originally specified as cement bases.

15. Floors, bases, and steps broken and in need of repair in basement and bulkhead floors.

Sec. 20 Page 2 Par. 4 Dr. 2-10

16. Columns and pipes not furred in in barber shop and elevator machine room in bulkhead.

Sec. 21

17. Par. 20 on page 10 of the Plastering specification and schedule sheet #14 calls for a wainscot of Keene's cement, 4'-6" high, in all service elevator vestibules and lobbies throughout the building. No Keene's cement wainscot were put in any of these spaces. 2313

Sec. 21 Page 3 & 7

18. Damaged and uneven plaster work in need of patching and replacement.

Dr. 10

19. Ceilings of the terraces on the 39th floor were left unfinished, having only the scratch coat applied.

2314 not called for

20. Fan room on mezzanine roof in east court has not been plastered.

Dr. 14

21. Tank rooms, elevator machine rooms, etc. were to be faced with a smooth hollow tile. These rooms, with the exception of the elevator machine rooms on the 21st floor, have been plastered with cement plaster instead. The elevator machine rooms on the 19th floor have been white coated.

Sec. 4
Page 9

22. Glass shelving omitted from all medicine cabinets.

Sec. 27
2315 Page 6 Par. 11
Dr. 14

23. Mirrors omitted from mirror doors on all floors with the exception of a few on the topmost floors. Approximately 670 full length mirrors were omitted.

Sec. 4
Page 9

24. Medicine cabinet mirrors that are imperfect have not been replaced.

Dr. 14-2
M. E.

25. Beauty and barber shop unfinished—originally supposed to have had tile floor and base, 6′-9″ tile wainscot, plaster walls, cove cornice and furred ceiling; roughing for plumbing fixtures and electric wall and base receptacles omitted.

2316 Sec. 29
Page 7 Par. 13

26. Combination soap, glass and toothbrush holders omitted from bathrooms.

M. E.
Page 43
Par. 90

27. Shower curtains omitted from all baths with showers.

M. E. P 40
Par. 83

28. Liquid soap dispenser for public toilet rooms omitted.

29. Five extinguishers omitted.

t fl. plan 30. Five (5) lavatories omitted from barber shop. 2317

I E plan 31. Drain in incinerator pit omitted.

ec. 29 32. Crazed tile in bath rooms has not been replaced, as called for on page 8 par. 14 of the Tile Work specification.

Detail Dr. 33. Teak and burl wall panelling was omitted from behind the desk space, cashier's space and news and ticket stand.

ec. 19 34. Teak and burl panelling on ground floor has
. 4 Par. 11 blistered and opened up at joints in several places. This work has not been finished as described in the Cabinet Work specification 2318 on page 6 par 12.

35. Key and mail racks omitted from clerk's space.

Detail 36. Four counter screens of burls and ebony were
#216 omitted from founters of desk space in main entrance lobby.

ec. 16 37. Ornamental bronze and glass screens de-
P 8. Par 14-19 tailed on drawings #202 and #203, were omitted from the following locations:—

Between palm room and entrance lobby; breakfast room and entrance lobby; entrance foyer and men's and women's lounges; elevator lobby and stenographer's room; elevator lobby and fountain lounge. 2319

ec. 1 38. Two bronze radiator grilles omitted in 59th
P 1. Par 3 Street entrance vestibule.

M. E. 39. Radiators omitted from all interior bath rooms.

2320	M. E.	40. Radiators for the West 58th Street shops and barber and beauty shops are not installed.
	M. E.	41. Gauges, valve charts and brass tags for valves of heating system omitted.
		42. Rubbish chute from 40th floor to basement omitted.
	Sec. 22 P 5. Par. 12-14	43. Built-up roofing on court roofs left in need of repair and sections of felt flashing omitted.
	Dr 10	44. Copper louvres and screens were omitted from the main stack on the main bulkhead roof.
2321	Sec. 26 P. 5 Par. 12	45. Ordinary kalamein doors installed in fan rooms on roofs instead of copper kalamein as specified.
		46. Damaged doors and bucks in duplex apartments on the 39th and 40th floors should be replaced with new doors.
	Sec 25 P 1. Par 4	47. Rubber bumpers for elevator door stops not installed.
		48. Elevator doors need adjusting.
		49. Glazing beads missing from exterior glazed doors.
2322		
	M. E.	50. Access doors in bath rooms, etc. with broken hinges, catches, etc. left in need of repair.
	Sec 18 P. 9 Par 32	51. Hooks and hanging rods omitted from many of the closets throughout the building.
	Sec 4	52. Many doors throughout the building without locks, escutcheons, or knobs.
	Sec 4	53. Hardware missing from fan room windows on the 41st floor.

ec 4

54. Door bumpers and stops omitted in many places where same are required. 2323

ec 4
age 9

55. No master keying system was made for the building.

56. Railing and ladder in front of steam room not properly secured to floor.

ec 15
. 15 Par 26

57. An allowance of $150.00 was made for a vault door for a book vault in the executive office on the mezzanine. This vault was omitted.

r 1

58. Ladder in meter closet omitted, also ladder in one of the elevator pits.

M. E.

59. Wire safety guards around movable parts of ice-making and refrigerating machinery omitted. 2324

M. E.
. 30 Par 65

60. Siamese connection omitted on East side of West 58th Street entrance.

M. E.

61. Perforated brass plate for vent to gas meter room under 58th Street sidewalks was omitted.

ec. 10

62. Brick costing $33.00 per thousand was used instead of the $38.00 per thousand brick specified on page 3 par. 5 of the Masonry specification.

ec 10
. 9 Par 13

63. Brickwork needs to be pointed in various places. 2325

ec. 28
. 2 Par 4
6 Par 15

64. Marble borders in entrance foyer, main entrance lobby, men's and women's lounges, palm room, dining room terraces, breakfast room and terrace, corridor #1, elevator lobby, stenographer's room, telephone room, fountain lounge, etc., except along edges of terraces, were omitted and terrazzo used in its place.

2326 Sec 28 P 4 Par 8

65. Blue Belge marble was substituted for French Rouge Antique or Red Levante marble for counter tops in desk space, cashier's space, news and ticket stand, head porter's closet, house phone desk, and on top of the low partitions between foyer and men's and women's lounges.

Blue Belge marble was also substituted for Tinos and Noir Fossile marbles where same were specified for bases on the ground floor details and in revised marble specification of April 30th, 1931.

2327

66. Where French Rouge Antique or Red Lavante marble was specified for stair treads on the ground floor plan, Blue Belge marble was substituted.

Sec 28 P 3 Par 13

67. Marble saddles missing from under several bath room doors.

Sec 30 P 4 Par 8

68. All terrazzo floors and borders throughout the public rooms on the ground floor were left unpolished.

69. Cork floor omitted from 39th floor elevator lobby.

2328 Dr 1

70. Concrete platform, iron pipe railing, trolley beam and block, and wrought iron ladder to pit were omitted in the incinerator room in the basement.

M. E.

71. Water storage tanks and piping in the tank rooms on the 22nd, 2nd bulkhead floors and tank room on roof were left unpainted.

Sec 31 P 9 Par 18

72. Machine and mechanical equipment rooms are spray painted only instead of having two (20

coats of Maxwells cold water paint as specified in the Plain Painting specification. 2329

31 Par 17

73. All furniture steel doors and kalamein doors and trim throughout the building have not been painted except for the shop coat.

31 0. Par 18

74. Excepting the basement, ground floor, stairways, bulkhead floors, and some of the rooms on the lower floors of the building, no painting has been done. The living rooms, bed rooms, foyers, baths, etc., on the lower floors that have been painted have only two (2) coats of paint on the walls and kalsomined ceilings instead of the three (3) coats of lead and oil paint as specified. 2330

31 8. Par 17

75. Radiator enclosures painted two (2) coats only in rooms where the rooms have received the two (2) coats of paint. Balance of enclosures have only the shop coat of paint.

31 10 Par 18

76. Cement bases painted only in rooms where walls have been painted.

E.

77. Various gauges and valves missing from pumps and gas and water lines.

E.

78. Charts and tags for valves not furnished. 2331

79. Parts of kitchen equipment missing and adjusting of other parts is necessary.

E.

80. Shower heads have been omitted from helps' shower rooms in basement.

81. Fire alarm system cards, frames, recorders, etc. omitted.

82. Charts and fuses omitted from panel boxes.

83. Lighting fixtures are missing from many rooms throughout the building.

2332

84. Striplights and reflectors omitted from cover around the fountain lounge on the ground floor.

Sec 4 P 9

85. $50,000. allowance was made for lighting fixtures, installation, connection and inspection fees—in our estimation less than half of this sum was spent for this work.

Sec 4 P 9

86. The following allowances were made in the original specifications, all of them in our opinion being in excess of the monies spent for the various items.

2333

Finishing Hardware	$50,000.
Medicine Cabinets	10,000.
Serving Pantry Cabinets	20,000.
Apartment Refrigerators	70,000.

87. Windows, toilets, floors, etc. not cleaned and rubbish left on premises.

88. Wood closets on IInd fl. omitted in 90% of rooms.

89. Shaft linings of express El. omitted.

90. Elevator Hangers substituted price reduced by $960.00

2334

91. Terra Cotta Saving —

92. Elevator speed—700 to 600 El spec. ¶ 2.

Plaintiff's Exhibit 90.

2335

[Letterhead of A. E. Lefcourt Realty Holdings.]

April 9th, 1930.

Mr. Frank Grad,
521 Fifth Avenue,
New York City.

Re:—Central Park Properties
58th-59th Streets

Dear Sir:—

In reply to your favor of the 8th instant, relative to the omission of the Bronze Screens, will 2336
you kindly call at this office with Mr. Sanger Thursday afternoon at 5 P. M., and we will then discuss the matter with you.

Yours very truly,

Central Park Properties, Inc.
By L. Haas
Secretary.

LH:EB.
(CC Lush-
Klein)

2337

Plaintiff's Exhibit 91 for Identification, a copy of a memorandum from C. W. Lush to Mr. Haas, dated March 6th, 1930, with reference to possible economies through omission of closets in servants' rooms, is omitted from the record.

Plaintiff's Exhibit 92.

2338 [Letterhead of A. E. Lefcourt Realty Holdings.]

March 17th, 1930.

Mr. Frank Grad,
521 Fifth Avenue,
New York City.

Re:—Central Park Properties

Dear Sir:—

Please note that built-in closets are to be omitted from the servants rooms listed below, as we are going to buy portable steel wardrobes in place
2339 of the closets.

Hollow Metal Prod. Corp.'s buck schedule should be corrected to omit the bucks for these closets.

Servants rooms #31, 32, 33, 34, 35, 36, 39, 40 to 49 inclusive, 51, 54, 55, 56, 57, 58, 59, 60 to 69 inclusive, 72 to 77 inclusive, 80, 83, 84, 85, 86, 87 and 88.

Very truly yours,

Central Park Properties, Inc.
By L. Haas
Secretary.

2340 CWL:LS
CC Mr. Klein-Mr. Kiely
Mr. Banfield
Hollow Metal Prod. Corp.

Plaintiff's Exhibit 93, the original cloth tracing of the second floor plan, Sheet No. 4 of the plans prepared by Frank Grad, architect, is omitted from the printed record, pursuant to stipulation and order (*supra*, p. 565) subject to the right of either party to submit the same to the Court if so advised.

Plaintiff's Exhibit 94.

2341

[Letterhead of A. E. Lefcourt Realty Holdings.]

December 7th, 1929.

Frank Grad,
521 Fifth Avenue,
New York City.

Re:—Central Park Properties.

Dear Sir:—

It has been decided to omit fireplaces from the following rooms:—

2342

Rooms 10 & 36 on 14th to 17th floors, incl.
" 6 & 21 " 18th to 20th " "
" 15 " 21st floor
" 5 & 20 " 22nd to 30th " "

Further in connection with these rooms, the mechanical specifications are to request one alternate for the omission of plumbing fixtures and refrigerators from serving pantries of these rooms, leaving roughing for same, and another alternate for the omission of roughing work, fixtures and refrigerators. Your specifications for cabinets should provide an alternate for the omission of cabinets from the serving pantries of these rooms.

2343

Very truly yours,

Central Park Properties, Inc.
By L. Haas
S
Secretary.

CWL:LS

CC Mr. Kingsley-Mr. Klein
Mr. Youngson

2344 Plaintiff's Exhibits for Identification Nos. 95 and 96, consisting of memos from C. W. Lush to Frank Grad, dated April 29, 1930, and March 5, 1930, directing the substitution of terrazzo for marble in certain locations, and the omission of caulking in certain window spaces are omitted from the printed record, pursuant to stipulation and order (*supra*, p. 565).

Plaintiff's Exhibit 97.

(Copy)

2345 [Letterhead of A. E. Lefcourt Realty Holdings.]

December 18th, 1929.

Otis Elevator Company,
11th Ave. & 26th St.,
New York City.

Attention of Mr. Glover Beardsley
Re:—Central Park Properties—58th & 59th Sts.

Gentlemen:—

2346 In reply to your favor of the 16th instant, which was in answer to our letter to you of the 12th instant, relative to the reducing of the speed of Passenger Cars #1, 2, and 3, and Combination Car #4, from 700 feet per minute to 600 feet per minute, and for which you have agreed to allow us a credit of $2840.00 for this change, we wish to say that we have decided to make this change, and also to take advantage of the credit you allow.

Will you therefore, kindly send us a credit memorandum for this amount, and also send us

Plaintiff's Exhibit 97

five copies of a rider, noting this change, which we will attach to and paste on the page covering this change in the contracts. 2347

Thanking you, and awaiting your reply, we remain

Yours very truly,

CENTRAL PARK PROPERTIES, INC.

By_____

LH:EB Secretary.

(CC Grad-Kingsley-
Lush-Klein-Mayer)

Plaintiff's Exhibits 98, 99, 100, 101 and 102, consisting of mechanical specifications for the building, dated June 1, 1929, and labeled respectively "Heating and Ventilating," "Plumbing," "Electric," "Refrigerators" and "Elevators," are omitted from the printed record, pursuant to stipulation and order (*supra*, p. 565) subject to the right of either party to submit the same to the Court if so advised. 2348

Plaintiff's Exhibit 103.

[LETTERHEAD OF A. E. LEFCOURT REALTY HOLDINGS.] 2349

November 15th, 1929.

Mr. Frank Grad,
521 Fifth Avenue,
New York City.

Re:—Central Park Properties
58th-59th Sts.

Dear Sir:—

We are in receipt of your favor of the 9th instant, relative to the manner in which the bids

Plaintiff's Exhibit 103

2350 for Terra Cotta have been received by us, and we do not agree with your statement; neither do we agree with the statement of the Terra Cotta manufacturers.

Nobody can disagree with the fact that at least 25 to 30% of Terra Cotta was omitted from the revised plans, and this certainly is a factor in arriving at the cost, and we still insist that something will have to be done between you, the plans and the bidders, in order to get them back and make some reduction without fail immediately.

Yours very truly,

2351 CENTRAL PARK PROPERTIES, INC.
By L. HAAS
Secretary.

LH:EB.

2352

Plaintiff's Exhibit 104.

Plaintiff's Exhibit 105 for Identification, consisting of bulky note-books and work-sheets prepared by Mr. O'Brien and Mr. Lukach, and introduced during the testimony of Mr. Lukach (p. 226), are omitted from the printed record by stipulation and order (*supra*, p. 565).

Plaintiff's Exhibit 106.

(Copy)

May 27, 1931.

Keeler, Inc.,
Graybar Building,
New York City

Re: 160 W. 59th Street

Dear Sirs:

We are handing your representative, Mr. Switzer, today, complete electrical, plumbing and heating and ventilating plans for the above building comprising 43 sheets; also one complete set of architectural plans, comprising 14 sheets of blue-prints:

In addition, we are also furnishing you with the following specifications prepared by Frank Grad, Architect:

Special Conditions
Preliminary & Miscellaneous Work
Excavation
Concrete Masonry
Arch Construction & Fireproofing
Concrete Fill & Cement Finish
Masonry
Granite
Cut Stone

Plaintiff's Exhibit 106

Terra Cotta
Steel Stairs
Ornamental & Misc. Iron
Ornamental Bronze
Waterproofing & Caulking
Carpentry & Mill Work
Cabinet Work
Structural Steel
Metal Furring & Lathing
Plastering
Sheet Metal & Roofing
Solid Steel Windows
Metal Windows
Hollow Metal Work
Kalamein Work
Glass & Glazing
Marble Work
Tile Work
Terrazzo
Plain Painting
Mail Chute
Garbage Refuse Destructor
Soundproofing

2359

2360

Very truly yours,

58-59 Realty Corporation,
By A S L
A. S. Lukach.

2361

Received by
Keeler, Inc.,
Keeler, Inc.
By H. Switzer

Dated

Plaintiff's Exhibit 107.

2362 [Letterhead of Globe Painting and Decorating Company, Inc.]

Apr. 11, 1931

Re: #160 West 59 Street

Mr. A. S. Lukach
160 West 59 St.,
New York City.

Dear Sir:

Replying to your verbal request for information as to why the walls on the above job cannot
2363 be finished with one coat of paint, please be advised that the job has been standing in the present condition for such a length of time that the proper adhesive qualities of the paint surface on the plaster have disappeared to a great extent and it will be necessary to apply a treatment that will cause the finishing coat of paint to adhere properly and cover.

Very truly yours,

Globe Painting and Decorating Co., Inc.
P H Gladstone
P. H. Gladstone—Gen. Mgr.

2364 D

Plaintiff's Exhibit 108.

2365

[Letterhead of A. E. Lefcourt Realty Holdings.]

October 16th, 1929.

Mr. Frank Grad,
521 Fifth Avenue,
New York City.

Att. of Mr. Sanger
Re: Central Park Properties

Dear Sir:

Enclosed herewith is transcript of our notes on Heating and Plumbing. The notes on Plumbing were given you on October 11th. 2366

We also wish to confirm the verbal instructions given on certain features, as follows:

1.—No radiation to be provided for interior bath-rooms.

2.—Lever handles to be used on radiator control valves.

3.—No linen or rubbish chute to be provided.

4.—Two (2″) inches of cinder fill and 1″ of cement finish is to be used in lieu of monolithic finish. 2367

Yours very truly,

Central Park Properties, Inc.
By L. Haas S.
Secretary.

WCL:EB.
(CC Klein)

Plaintiff's Exhibit 109.

2368

22nd

Initialed O. E. Co.
NLS
GSL

AGREEMENT made the ~~16th~~ day of April, 1931 BETWEEN 58-59 REALTY CORPORATION hereinafter called the builder, and OTIS ELEVATOR COMPANY, hereinafter called the contractor.

WITNESSETH: Article I. The Contractor shall provide for the building hereinafter mentioned all the labor and materials hereinafter set forth ~~in accordance with the specifications hereto annexed and as shown on plans, drawings and details prepared by the builder's architect, which plans, etc., are to be returned to the builder upon the completion of the work. Such additional drawings as may be necessary to explain and detail the work will be furnished by the architect, and are to be conformed to except where inconsistent with original plans and specifications. The plans, drawings and details, and the specifications are intended to supplement one another, and any work or materials shown or mentioned in one and not in the others are to be furnished by the contractor without extra charge. The enumeration of particular items in this agreement or in the specifications shall not be construed to exclude other items.~~ The contractor shall furnish, without extra charge, all work and materials not mentioned or shown, but generally included under this class of contract, and also any work or materials of the kind herein contracted for required to conform the building to all Laws, and the Rules and Regulations of all Municipal Departments.*

2369

Initialed O. E. Co.
NLS
GSL

2370

* * * * * * * *

Contractor's Address—11th Avenue and 26th Street, New York City

Builder's Address—160 W. 59th St., City

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* Certain formal portions of this contract, Exhibit 109, not material to this cause, are omitted from the printed record, pursuant to stipulation (*supra*, p. 565).

Plaintiff's Exhibit 109

Architect—Frank Grad, 1023 Broad Street, Newark, N. J. 2371

Description of Building—One forty story hotel building with basement, and pent house situated at 160 West 59th Street and 155-165 West 58th Street, Borough of Manhattan, City of New York —size of plot being 206'4" x 200'10".

Labor and Materials to be furnished by contractor—For furnishing all labor and material required to complete the original contract covering all elevators, signal systems, door operating devices and allied equipment.

2372

The contractor guarantees, for a period of one (1) year from final acceptance, to repair, replace and make good any defects due to faulty workmanship or material.

The contractor will instruct the Owner's representatives in the proper operation and maintenance of all equipment and will, after completion, give the entire installation their usual inspection and supervision.

Contract Price—Fourteen Thousand Five Hundred ($14,500) Dollars.

* * * * * * * * 2373

58-59 Realty Corporation
By A. S. Lukach
Vice-President
H. A. Frey,
President

Otis Elevator Company,
Manhattan Zone
By N. L. Summerlat,
Assistant Sales Manager.

Defendants' Exhibit A.

2374 Pr. Bldg. & ~~Perm.~~ Acceptance 1/28—No. 264.

Search Entered by.....

Title No. .....

THE PRUDENCE COMPANY, INC.

331 Madison Avenue, New York

162 Remsen Street, Brooklyn
161-10 Jamaica Avenue, Jamaica, N. Y.

2375 (The above is endorsed upon the back of the instrument, the text of which follows:)

LOAN ACCEPTANCE

September 6th 1929

Central Park Properties, Inc.,
1359 Broadway,
New York, N. Y.

GENTLEMEN:

Upon the terms and conditions herein set forth, we accept your application for a building ~~and permanent~~ first mortgage loan in the amount of
2376 SIX MILLION SIX HUNDRED FIFTY THOUSAND— dollars, to be secured by the bond and mortgage hereinafter mentioned, said mortgage to cover the premises hereinafter referred to or described; at our option, said loan may be made by our nominee, in which case the building loan agreement hereinafter provided for shall be made by such nominee and the bond and mortgage hereinafter provided for shall be made to such nominee.

You agree to supply the information herein required, and to execute and deliver the papers herein provided for.

Loan Acceptance

PREMISES: 2377

The land described in Schedule "A" hereof, together with the buildings and other improvements erected and to be erected thereon, and the equipment and personal property contained or to be contained therein, and also the appurtenances if any, to said premises, including all easements and rights of way.

TITLE AND SURVEYS:

You agree that such mortgage shall be a valid first lien in the amount thereof on said premises and on a good and marketable title thereto in fee 2378
simple, free and clear of all liens and encumbrances and of such nature as the Title Insurance Company to which application is made for title insurance to cover the mortgage, shall approve and insure as good and marketable in fee simple. Restrictive covenants against nuisances and party wall agreement as modified, as shown in report of Lawyers Title and Guaranty Co., will be passed by us.

BOND AND MORTGAGE, BUILDING LOAN AGREEMENT AND OTHER PAPERS:

You are to execute, acknowledge and deliver a 2379
bond and first mortgage, corporate consents if any are required, and any other instruments required by our counsel to constitute said mortgage a valid first lien upon said premises; all instruments to be on the forms usually employed by us. The principal amount of said bond and mortgage shall be SIX MILLION SIX HUNDRED AND FIFTY THOUSAND —dollars. Said bond and mortgage shall bear interest at the rate of—six—per cent. per annum, payable September 16, 1930 and quarter-annually

thereafter; interest on the full principal amount shall run from the date herein fixed for completion of the building to be erected on said premises, whether or not said building be completed on said day, unless the full amount shall be fully advanced prior to said day, in which case interest on the full amount of principal shall run from the date of the final advance; interest on all amounts advanced prior to such completion date shall be due at the time of each succeeding advance and upon any regular interest date occurring prior to such completion date. The principal amount of said bond and mortgage shall be due and payable ~~in instalments as follows~~: December 16, 1930 Subject to all the terms and conditions of this agreement, we agree to make a first advance, at the time herein set for closing, of $3,250,000 gross, from which all fees, commissions and disbursements, as provided herein, shall be deducted.

Upon compliance by you with all the terms and conditions of this agreement and provided you are not in default as to any of the terms and conditions of the building loan agreement and the bond and mortgage to be given hereunder, we agree to make subsequent advances on the basis of 75% of the value, as determined by us, of labor and materials installed and incorporated in the work.

~~At our option the maturity of said mortgage may be subsequent to the date above provided but not later than _____ 19____, and we may change the instalment and interest payment dates to~~

We may take existing mortgages on said premises by assignment at the closing of this loan, and upon our request you will arrange with the mortgagees for assignment or assignments of such

mortgages and we shall be entitled to have such 2383
mortgages spread, consolidated, modified and extended in conjunction with a new mortgage for the balance of principal amount of this loan, in such manner as to create a valid first lien in the amount of this loan on a good and marketable title in fee simple to the said premises described in Schedule A of the nature hereinabove specified. You represent that the mortgage tax of one-half of one per centum has been paid upon all mortgages now liens upon the premises. ~~At our option, you shall execute, on the closing of this loan, two bonds and mortgages in amounts designated by us and totaling the principal amount of this~~ 2384
~~loan, such mortgages containing suitable provision for consolidation thereof upon completion of the building to be erected on said premises.~~

Payment of principal and interest on said bond and mortgage when due and all other payments required to be made hereunder and the performance of all the terms and conditions herein contained on your part to be performed pursuant to this acceptance, shall be guaranteed ~~jointly and severally~~ by Abraham E. Lefcourt, such guarantee to become null and void when customary certificates of occupancy have been issued by 2385
Municipal or State Departments having jurisdiction and deliver such guarantees on closing and you agree to obtain such guarantee or guarantees in form satisfactory to us.

~~Until the amount secured by said bond and mortgage is fully paid, the owner of the mortgaged premises shall deposit in advance with us, whether or not we shall then be the holder of said bond and mortgage, on the first day of~~

2386 ~~19 .; and thereafter, the equal proportionate part of the principal and interest falling due on said bond on the next succeeding interest date and the equal proportionate part of the taxes which will fall due nearest such interest date (whether before or after). Said deposits shall be held by us without interest to the depositor and applied as follows: so much of said deposits as may be required to pay taxes shall be reserved and used to pay the same and the balance shall be applied on interest dates for the other purposes for which deposited. —The mortgage shall provide that both principal and interest shall be payable without deduction for any Federal or State taxes, assessments or charges, and that there shall be paid to us semi-annually, an amount equal to four per cent. of the semi-annual interest on said bond and mortgage in lieu of normal Federal income taxes.~~

2387 You are to execute, acknowledge and deliver a building loan agreement in our standard form, which agreement shall contain the terms of this loan and provide, among other things, that advances upon said bond and mortgage shall be made during construction in such amounts and at such times ~~as our appraisers shall approve~~ as herein before provided.

2388 ~~—All existing leases on the premises shall, at our option, be assigned to us on the closing of this loan as additional security.~~

INSURANCE AND SURETY BOND:

You will place through Remsen Brokerage Company, Inc., 166 Remsen Street, Brooklyn, New York, or any other insurance broker designated by The Prudence Company, Inc., the surety bond

hereinafter mentioned, and all fire, lightning, 2389
~~workmen's~~ ~~compensation,~~ ~~tornado,~~ ~~flood,~~ ~~earthquake~~ and steam boiler explosion insurance together with any other insurance deemed necessary by us, affecting the buildings and improvements on said premises until the mortgage is paid. The facilities of that Company will be at your service to co-operate with you in procuring minimum rates.

You shall furnish a surety bond in the amount
$3,000,000
of /~~this~~ ~~loan,~~ in form satisfactory to us and in a Company satisfactory to us, guaranteeing to us completion of said building equipped as herein 2390
provided, within the time specified, in accordance with said plans and specifications, and free from mechanics liens.

NEW BUILDING:

You agree to erect upon said premises, a build-
Heretofore submitted to us by Frank Grad, Architect

ing from plans / and specifications ~~to be~~ submitted
to be
to and /made satisfactory to us in every respect, including design, material and workmanship, said 2391
~~plans and~~ specifications to be ~~so submitted and~~ approved before construction work is commenced, and you agree that construction work shall commence not later than September 23rd 1929, and shall proceed continuously thereafter so that the building shall be completed and ready for occupancy not later than December 16, 1930 (hereinafter referred to as the date for completion). Said building and the materials and workmanship therein contained, shall be in all respects ~~at least~~

2392 ~~equal to the building at~~ a first-class apartment hotel.

You represent that the cubical contents of said building when completed will be not less than 7,000,000 cubic feet to be computed from a point four inches below the top of the finished cellar floor to the average height of the top of the roof beams.

We shall have the privilege of placing and keeping neat advertising signs on said building during the course of construction. The owner shall have the right to move and replace said signs on the building as becomes necessary during construc-
2393 tion.

REPRESENTATIONS AS TO FINANCIAL STANDING, AND OTHER ITEMS:

This acceptance is at our option conditional upon the following representations made by you, satisfactory evidence supporting which you shall furnish to us at any time upon our request in form satisfactory to our counsel:

The aggregate net worth of Abraham E. Lefcourt exclusive of any interest in the premises described in Schedule "A" is in excess of Three Million Five Hundred Thousand Dollars, and you
2394 five
agree to furnish to us at least / ~~fifteen~~ days before the closing date hereinafter mentioned, financial statements of said persons to such effect satisfactory to us and upon our usual printed forms.

You paid for said land, the sum of Four Million dollars, in the year 1928. ~~The building now being (to be) erected on said land will cost at least the sum of ——————— dollars.~~

Loan Acceptance

You represent that there is on record a mortgage 2395
of $1,400,000. a lien upon the premises described in Schedule "A", which at or prior to closing will be subordinated to said first mortgage of $6,650,000. and that there is an agreement made in connection with said mortgage of $1,400,000 which provides that upon completion of said building to be erected on the premises described in Schedule "A" that the holder of said mortgage of $1,400,000 will advance an additional sum of $600,000, making said second mortgage upon completion of said building in principal amount $2,000,000 subordinate to said first mortgage of 2396
$6,650,000, all of which subordination agreements shall be in form and substance satisfactory to our counsel, and you represent that said agreement to advance the additional sum of $600,000. is guaranteed by Frederick Brown.

You agree that prior to the time herein set for closing that you will cause or already have caused plans for said building to be filed with the Municipal and State Departments having jurisdiction, and that you will obtain or already have obtained the approval of such departments to such plans, and you further agree that we shall not be required to make any advances hereunder unless at 2397
the time herein set for closing you exhibit to us all necessary permits and certificates of approval issued by the departments having jurisdiction authorizing the erection of the building shown on the plans referred to herein, and that such approval and permits shall be in effect on the day of closing.

If you are unable to secure a permit for the erection of the proposed building, it is understood and

agreed that the amount of liquidated damages shall be the sum of $25,000, which you have paid on account of the fee.

FEES:

You shall pay to us a fee of Four Hundred Thousand dollars on the date hereinafter set for closing this loan, as part consideration for our agreement to make this loan. If you refuse or fail to close this loan and we are not in default, the entire damages which we will thereby sustain cannot be determined exactly, therefore it is agreed that, in the event of default upon your $50,000. part, you shall pay to us the amount of ~~said fee~~ on said date set for closing as liquidated damages for your refusal or failure to perform this agreement completely, ~~or, at our option, in case of such default by you we may require that you comply with all of the terms of this agreement.~~ which includes $25,000. paid on account of said fee

You shall pay in addition to the fee above mentioned the fees of our counsel for the drawing of the necessary instruments, the recording fees, the revenue stamps, if any, required on any documents, the mortgage tax on any mortgage herein provided for, and also the gross charges of the Title Company for examination of title to said premises and issuance of its policy in the amount of this loan and its charges for making searches on advances and for attendance at each building loan advance, together with our inspection fees of $25. for each inspection. Surveys, whenever required by us, shall be furnished by you acceptable to us.

Loan Acceptance

~~You shall sign the application for title insurance~~, but such title insurance is to be ordered through our counsel and report of title is to be delivered to our counsel. 2401

Receipt is hereby acknowledged of $25,000.— on account of the fee payable to us as above provided for. Time of closing is of the essence of this agreement

CLOSING:

You agree to execute, acknowledge and deliver the building loan agreements hereinbefore provided for, at our office, 331 Madison Ave. N. Y. 11 2402 City on September 23, 1929, at ~~10~~ A. M.

This loan shall close at our office, 331 Madison 11 Ave. N. Y. City on September 23, 1929, at ~~10~~ A. M., ~~or prior thereto upon three days' written notice to you,~~ at the time of which closing you shall deliver said bond and mortgage and other instruments herein provided for. The bond and mortgage and all other instruments shall be upon our usual forms and satisfactory to our counsel.

THE PRUDENCE COMPANY, INC.,
By: 2403

President
Vice-President

Secretary
Treasurer

Having made application to THE PRUDENCE COMPANY, INC., for a loan in the amount and upon

Loan Acceptance

2404 the terms hereinbefore set forth, we hereby accept such loan upon said terms and conditions, and agree to execute all instruments therein required, and we further covenant and agree to comply with all the terms and conditions hereinbefore set forth on our part to be performed, and to make all payments on our part to be made.

CENTRAL PARK PROPERTIES, INC.

By:.....

President.

.....

Secretary

2405 To induce THE PRUDENCE COMPANY, INC., to deliver the foregoing loan acceptance and in consideration thereof, ~~we,~~ the undersigned, sometimes herein referred to as guarantors, ~~jointly and severally~~ guarantee to THE PRUDENCE COMPANY, INC., payment its successors and assigns, the ~~performance~~ by CENTRAL PARK PROPERTIES, INC. of above mentioned liquidated damages of $50,000. or $25,000. as herein provided if said loan does not close as herein provided. ~~of all the terms, conditions and~~

2406 ~~agreements contained in the foregoing acceptance, or either of them, and we, the said guarantors, further guarantee the payment of all fees, disbursements and expense provided for in said acceptance, and we further agree to execute and deliver upon the signing of the building loan agreement provided for in said acceptance, a guarantee of the performance thereof by the borrower therein named; we, said guarantors, further agree to execute and deliver a guarantee of payment of principal and interest of the mortgage~~

~~hereinbefore mentioned, and a guarantee of the performance by the mortgagor of all the terms and conditions contained in such mortgage. All such guarantees shall be in form satisfactory to the counsel for The Prudence Company, Inc.~~ 2407

_____ (L. S.)

_____ (L. S.)

_____ (L. S.)

_____ (L. S.)

THE PRUDENCE COMPANY, INC. 2408

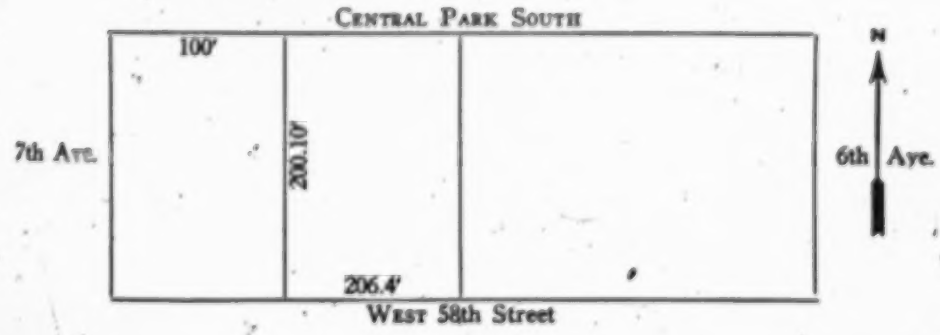
WITH

BUILDING ~~AND PERMANENT~~
LOAN ACCEPTANCE

SCHEDULE "A"

PREMISES:

The mortagage shall cover premises situated in the Borough of Manhattan County of New York, City and State of New York, bounded and described as follows: 2409



2410 BUILDING:

40 story and basement fireproof apartment hotel containing 1,269 rooms and 687 bathrooms

EQUIPMENT:

Complete customary equipment for buildings of this type (Hotel furniture and furnishings not included herein)

SUGGESTIONS AND REMINDERS TO THE BORROWER

2411 1. The borrower should immediately order and furnish to lender survey of premises acceptable to and guaranteed to the Title Company showing conditions at the first advance; and thereafter have the survey continued, (*a*) When exterior walls are completed to height of first story, (*b*) If the building is to be ten or more stories high, again when such exterior walls are completed to approximately one-half the height of building, (*c*) To show enclosure of building, (*d*) Showing completion of building.

2412 2. If there are any unpaid franchise taxes against the borrower or any corporation in the chain of title, the borrower should immediately arrange for the filing of reports with the proper State authorities and the payment of such taxes.

3. The borrower should immediately cause the removal of any violations filed against the premises by any department of the City or State of New York, and dispose of any mechanic's liens or other liens upon or objections to the title of the premises.

Defendants' Exhibit B—Report of Billsborrow

4. The borrower should produce at the closing, tax and water receipts and franchise tax receipts for the current year, with insurance policies now on premises and also any leases, easement, set-back or other agreements affecting the premises. 2413

5. The lender will appreciate having you bring to the attention of any mortgagee receiving money at the closing, that Prudence-Bonds and Prudence Mortgage Certificates secured by first mortgages on improved, income-producing property, are available for reinvestment of such funds.

2414

Defendants' Exhibit B.

PLANTIFF'S EXHIBIT 45 FOR IDENTIFICATION.

November 10th, 1930

Mr. Braislin:

Re: Central Park Properties, Inc.—Central Park So. S/S running thru. to W. 58th Street, 100′ E. of 7th Avenue Manhattan.

On Friday, November 7th, I inspected the above mentioned job and noted some of the missing items as follows: 2415

ORNAMENTAL IRON & BRONZE: 96% complete

There still remained railings in the main dining room and the east breakfast room to be erected; bronze radiator grilles on all of the windows along the 59th Street side; (3) store doors missing out of four on the 58th Street side.

2416 VENTILATION: 96% complete.

There still remained the item of hooking up the fan that takes care of the ventilation of all baths and kitchenettes above the 22nd floor. They also had some men testing the ventilation in the main kitchen on November 7th.

PLASTER: (Both Brown & White) 99 plus and 98¾% respectively.

The walls and ceilings are still to be finished in the stores east of the 58th Street entrance. Plaster patching has not been completed.

2417 HARDWARE: 40% complete.

We have marked "hardware" 40% complete due to the fact that there are no apartment door locks or interior door locks installed above the 12th floor.

TERRAZZO: (82%)

We have marked "terrazzo" 82% due to the fact that the 59th Street side of the lobby floor has yet to receive its final rubbing and polishing and the surface of the 58th Street side has not been ground down.

2418 MARBLE: (95%)

There still remains all the marble cleaning to be done on the first floor; all saddles to be cleaned below the 25th floor; marble radiator tops have not been installed in two apartments on the 18th floor and also one radiator top in one apartment on the 31st floor.

GLASS & GLAZING: (70%)

We have marked the above item 70% due to the fact that there were no mirrors installed

in the chamber doors in any of the apartments above the 10th floor. 2419

METAL SASH: (98%)

We marked the above item 98% complete due to the fact that there is no window hardware installed on any of the windows above the 12th floor. The hardware meant here is that each double hung window receives (2) sash lifts, (1) sash fast and (1) sash pull.

WOOD FLOORS: (50%) complete.

No finished wood floors have been laid in the main dining room as yet and the three small auxiliary dining rooms have not been scraped or finished. 2420

LOBBY DECORATION: 5% complete.

The only work done is that the walls and ceilings have been sized.

MAIN KITCHEN EQUIPMENT: 95% complete.

No sinks have been connected.
The steam fitters were on the job hooking up the heating tables. There are still four tables to be connected. The steam fitters were also hooking up the gas ranges and there are still four of same to be hooked up. 2421

The cabinet gas ovens have not been connected.

MAIN ICE PLANT: 95% complete.

There were men on the job today covering the brine circulating pipes and they had not finished.

2422 CARPENTRY FINISH: (75%) complete.

There still remained the wainscoting of the east and south walls of the breakfast room and also one column that has not been covered. None of the wainscoting has been rubbed down and waxed as yet.

ELECTRIC FIXTURES: 65% complete

There are no electric fixtures in the main lobby, dining room, etc., on the first floor. There are no glass enclosures installed on the chamber ceiling fixtures throughout the building.

2423 REFRIGERATORS: 36% complete.

On Wednesday morning, November 5th, there were no refrigerators connected in any of the apartments above the 14th floor. The plumbers came back to work on Wednesday and by putting a man on each floor, all hooking up refrigerators, they had quite a few hooked up by Friday on all of the floors between the 15th and the 23rd floors.

PAINTING: 75% complete.

2424 None of the apartments or elevator halls above the fifth floor have received a final coat of paint; no stairs have received cement paint on treads and landings.

RADIATORS: 95% complete

No floor plates have been installed on the supply and return connections of any of the radiators throughout the building.

KITCHEN CABINETS: 75% complete. 2425

No drain boards were installed in any of the apartments above the 18th floor.

BATHROOM FIXTURES: 96% complete.

There are the following items lacking in all apartments:—toilet seats, shower curtains and also the cleaning of the plumbing fixtures.

REB.
R. E. BILLSBORROW
ENG. & INSPECTION DEPT.

REB:FG

2426

PLAINTIFF'S EXHIBIT 46 FOR IDENTIFICATION.

November 28th, 1930

Mr. Braislin:—

Re Central Park Properties, Inc.—Central Park South S/S running thru. to West 58th Street, 100' E. of 7th Avenue, Manhattan, N. Y.

In reference to memorandum dated November 21st, we have made an inspection today of the 2427
above job which is itemized as follows:—

ELECTRIC WORK:

There still remains some switches and receptacles to be installed on the first floor.

ORNAMENTAL IRON AND BRONZE:

There are two transoms over the store door entrances on the 58th Street side and also bronze doors leading from the main hall to the east store that are missing.

2428 PLASTER:

There is still the east store on the 58th Street side to be plastered and also plaster patching throughout the building mainly around where the drain boards have just recently been installed.

ELEVATORS:

The men are still working on the elevators and at present only one elevator can be had to reach the top of the building since the other cars are not quite ready.

2429 CEMENT FLOOR & BASE:

The cement floor and base is still to be installed in the east store on the 58th Street side.

METAL SASH:

We have written Mr. Haas, stating that daylight shows through around some of the metal sash and as yet they have not taken care of same.

DOORS HUNG:

2430 In the duplex apartments there is still the pantry and kitchen double-acting doors to be hung.

HARDWARE:

They were installing the hardware today on the 26th to the 30th floors inclusive. Everything above this is yet to be done.

TILE:

There is still tile work to be completed in the niche off the main lobby.

TERRAZZO:

2431

All of the main lobby, etc., is to receive the final rubbing and polishing.

MARBLE:

There still remains the marble saddles in the duplex apartments to be set and also some cleaning of marble on the first floor.

WOOD FLOORS:

The main dining room and three small dining rooms on the first floor are still to be scraped and finished.

2432

GENERAL PAINTING:

All of the apartments and elevator vestibules have yet to receive a final coat of paint. The treads and landings of the service stairs, etc. have not been painted.

ELECTRIC FIXTURES:

There are a few electric fixtures to be installed in the main lobby, dining room, etc.

APARTMENT KITCHEN CABINETS:

There still remains some drain boards especially in the westerly apartments to be installed and also some closure pieces on the top of same.

2433

GLASS & GLAZING:

There are some broken mirrors and also some missing mirrors evidently where special sizes will have to be obtained.

2434 PLUMBING:

There are almost 700 baths that will require toilet seats, shower curtains for showers, etc. They were starting at the top of the building today to install toilet seats.

HEATING & VENTILATING:

Floor registers are still to be installed in the two front apartments (59th Street side on the 22nd floor.)

CARPENTRY FINISH:

2435 There still remains the labor necessary to install the remaining portion of the hardware and the hanging of a few doors.

LOBBY PAINTING:

They are about half through painting the dining room ceiling and there still remains the final coat of paint to go on the dining room walls as well as the final glazing in some of the small rooms off the main foyer.

There is still a fair amount of rubbish to be removed for which we have allowed the sum of $500.00.

2436 REMARKS:

The above estimate does not of course take care of any unpaid balances to the contractors which might become liens.

REB.

R. E. BILLSBORROW

Estimate to Complete

PLAINTIFF'S EXHIBIT 47 FOR IDENTIFICATION. 2437

ESTIMATE TO COMPLETE

Central Park Properties, Inc.

1. Electric Work	$500.00	
2. Ornamental Iron & Bronze	200.00	
3. Plaster	1000.00	
4. Elevators	1500.00	
5. Cement Floor & Base	150.00	
6. Metal Sash & Hardware	500.00	
7. Fireproof Doors Hung & Bucks	200.00	
8. Hardware	4100.00	2438
9. Tile	200.00	
10. Terrazzo	800.00	
11. Marble	200.00	
12. Wood Floors	800.00	
13. General Painting	14000.00	
14. Electric Fixtures	1000.00	
15. Apartment Kit. Cabinets	1000.00	
16. Glass & Glazing	400.00	
17. Heating & Ventilating	350.00	
18. Plumbing	7100.00	
19. Carpentry Finish	1500.00	
20. Lobby Painting	6250.00	
21. Removal of Rubbish	500.00	2439
Total	$42250.00	

REB.

R. E. BILLSBORROW

November 28th, 1930

REB:FG

2440 PLAINTIFF'S EXHIBIT 48 FOR IDENTIFICATION.

Mr. Braislin:—

Re: Central Park Properties, Inc.—Central Park South, S/S running through to West 58th Street, 100' East of 7th Avenue, Manhattan, N. Y.

In reference to memorandum dated November 28th, we have made an inspection today of the above job which is itemized as follows:—

ORNAMENTAL IRON & BRONZE:

2441 There are (2) transoms over store door entrances on the 58th Street side and also (2) screens missing behind the grilles on either side of the 59th Street entrance.

PLASTER:

There is still the east store on the 58th Street side to be browned and white coated and also some miscellaneous patching throughout the building.

BATHROOM FIXTURES:

2442 There is still the item of bathcurtains which the plumber on the job maintains is not included in his contract. This item is evidently going to be left to the leasee to select his own. Our specifications call for shower curtains.

CEMENT FLOOR & BASE:

The cement floor and base is still to be installed in the east store on the 58th Street side.

METAL SASH: 2443

We wrote Mr. Haas on November 8th, stating that daylight showed through around some of the metal sash and he promised to have same taken care of but as yet this has not been done. We are holding $500. on this item until they have taken care of same.

FIREPROOF DOORS:

There are still (6) double-acting doors to be installed in the duplex apartments on the 40th floor; also there are (2) doors (one on the 22nd floor and another on the 23rd floor) 2444 that will have to be replaced as they are in bad shape. We wrote Mr. Haas on November 28th, regarding the door on the 23rd floor. On the job they claim that they have ordered new doors.

HARDWARE:

There is still the installation of all inside door locks in the (4) duplex apartments on the 40th to the 41st floor. The carpenter foreman stated that he thought there were approximately 100 locks missing. This latter figure of course being for the whole building. 2445

TILE:

The floor of the fountain on the first floor has not been laid.

TERRAZZO:

All of the main lobby, etc., is to receive it's final rubbing and polishing.

2446 MARBLE:

There is still some marble base throughout the first floor to be cleaned.

CARPENTRY FINISH:

There still remains the labor of installing the remaining hardware and the hanging of the above mentioned doors.

WOOD FLOORS:

The main dining room and the small dining rooms have yet to be scraped and finished.
2447 They started scraping of the small dining rooms today.

PAINTING:

All of the apartment and elevator vestibules have yet to receive a final coat of paint; also the stair treads and landings are to receive (2) coats of cement paint. The dado stripe should also be painted on the walls of all stairs.

ELECTRIC FIXTURES:

2448 There are no electric fixtures hung in the duplex apartments and there are (16) fixtures missing in the main dining room (the dining room fixtures I believe are on the job but have not been hung as yet.)

KITCHEN CABINETS:

There are (6) drainboards missing and also some closure pieces at the top of the cabinets.

LOBBY PAINTING:

They are now laying out the design on the ceiling of the writing lounge. Otherwise, the first floor painting is pretty well finished.

Estimate to Complete

GLASS & GLAZING: 2449

There is some miscellaneous breakage throughout the building and also some special size mirrors missing.

R. E. BILLSBORROW

December 16th, 1930

REB:FG

PLAINTIFF'S EXHIBIT 49 FOR IDENTIFICATION.

ESTIMATE TO COMPLETE 2450
12/16th/30

Central Park Properties, Incorporated

1.	Ornamental Iron & Bronze	$100.00
2.	Plaster	1000.00
3.	Cement Floor & Base	150.00
4.	Metal Sash & Hardware	500.00
5.	Fireproof Doors Hung & Bucks	200.00
6.	Hardware	500.00
7.	Tile	50.00
8.	Terrazzo	800.00
9.	Marble	100.00
10.	Wood Floors	800.00
11.	General Painting	14000.00
12.	Electric Fixtures	1000.00
13.	Apartment Kit. Cabinets	100.00
14.	Glass & Glazing	200.00
15.	Plumbing	2000.00
16.	Carpentry Finish	500.00
17.	Lobby Painting	1000.00
18.	Removal of Rubbish	500.00
	TOTAL	$23,500.00

2451

2452 PLAINTIFF'S EXHIBIT 50 FOR IDENTIFICATION.

INSPECTION REPORT

Hotels & Apartments (Fireproof)

Location:

Name: Central Park Properties, Inc.—Central Park South, S/S running thru. to W. 58th St.

		Date of Inspection	11/20	11/28	12/4	12/11	12/16
	1	Excavation	√	√	√	√	√
	2	Foundation	√	√	√	√	√
	3	Structural Steel	√	√	√	√	√
	4	Concrete Arches	√	√	√	√	√
	5	Brick Work	√	√	√	√	√
	6	Stone and Granite	√	√	√	√	√
	7	Terra Cotta	√	√	√	√	√
2453	8	Electric Work	99+	99+	99+	99+	√
	9	Orn. Iron and Bronze	98+	99+	99+	99+	99+
	10	Damproofing	√	√	√	√	√
	11	Plumbing, Rough	√	√	√	√	√
	12	Heating, Rough	√	√	√	√	√
	13	Partitions	√	√	√	√	√
	14	Plaster, Brown	99+	99+	99+	99+	99+
	15	Plaster, White	99+	99+	99+	99+	99+
	16	Roofing	√	√	√	√	√
	17	Sheet Metal	√	√	√	√	√
	18	Ventilation	98	98	√	√	√
	19	Elevator Construction	98+	99	99+	99+	√
	20	Elevator Cabs and Signals					√
2454	21	Bathroom Fixtures	98+	98+	99+	√	see report
	22	Cement Floor and Base	99+	99+	99+	99+	99+
	23	~~Wood~~ and Metal Sash	99+	99+	99+	√	see report √
	24	~~Wood~~ and F. P. Doors Hung	99+	99+	99+	99+	99+
	25	Hardware	60	80	90	98	99
	26	Radiators and ~~Boilers~~ N. Y. Steam	99+	99+	√	√	√
	27	Tile	99+	99+	99+	99+	99+
	28	Terrazzo	92	92	92	92	92
	29	Marble	98	98+	99	99+	99+

30	Mail Chute	√	√	√	√	√	2455
31	Carpentry, Rough	√	√	√	√	√	
32	Carpentry, Finish	90	98	99	99+	99+	
33	~~Weatherstrips~~ Wood Floors	85	85	85	85	85	
34	Painting	75	75	75	75	75	
35	Electric Fixtures	90	98	98	98	99	
36	Kitchen Equipment Main	√	√	√	√	√	
37	Refrigerators 473 of Same	√	√	√	√	√	
38	~~Gas Ranges~~ Ice Plant Main	√	√	√	√	√	
39	~~Laundry~~ Equipment Kitchen Cab	85	95	97	99+	99+	
40	Lobby Decorations	60	75	80	88	99	
41	Furnishings						
42	Incinerator	√	√	√	√	√	
43	Glass & Glazing	88	97	97	98	99+	
44	Electric Fix 1st Floor	35	95	95	95	98	2456

PLAINTIFF'S EXHIBIT 63 FOR IDENTIFICATION.

Mr. Braislin:

Re: Central Park Properties, Inc.—
Central Park South, S/S running through to West 58th Street, 100′ E. 7th Avenue Manhattan, N. Y.

I have itemized below a list of the unfinished work in the above building which is general and not an attempt to make a specific list of the work to be done: 2457

ORNAMENTAL IRON & BRONZE:

There are some transoms over store door entrances on the 58th Street side missing. The bronze grill doors on the first floor though hung are not fitted properly.

2458 PLASTER WORK:

The east store on the 58th Street side is to be browned and white coated also miscellaneous patching throughout the entire building is to be done.

BATHROOM FIXTURES:

Shower curtains are missing; missing fittings throughout will have to be replaced; the breakage of medicine cabinet doors taken care of and new bath tubs installed to replace the ones damaged.

2459 CEMENT WORK:

The cement floor and base is still to be installed in the east store on the 58th Street side. Kella stone for carpet nailing will have to be installed throughout the building.

METAL SASH:

Daylight shows through at places where (2) double hung windows are adjoining each other. Glazing beads will have to be replaced where missing as well as window and outside casement door hardware.

2460 DOORS:

There are still some double acting doors to be installed in the duplex apartments and also some damaged fireproof doors on the other floors which will have to be replaced.

HARDWARE:

Finish the installation of the hardware and also to sort out the keys on a suitable key board. There is still the item of closet hardware such as poles and hooks to be completed.

TILE WORK:

The floor of the fountain on the first floor is still to be completed and also the replacement of any damaged portions of tile work throughout the building. 2461

MARBLE:

There is still some marble to be cleaned on the first floor and possibly some replacement of damaged sills, etc., throughout the building.

TERRAZZO:

All of the main lobby, etc., has yet to receive its final rubbing and polishing 2462

CARPENTRY WORK:

There still remains the labor and such items as the installation of hardware, hanging of missing doors, completion of paneling work in the various rooms and the repairs necessary to the woodwork in the lobby and also the fixing of the steps leading to the terraces in the pent house apartments.

WOOD FLOORS:

The floors will have to be gone over and repaired where same are warped. The floors have yet to receive a final coat of varnish. 2463

ELECTRIC WORK:

Supply missing parts, etc., test out lighting system, fire alarm system, etc.

ELEVATORS (Including Signals):

Complete so as to be able to turn same over to owners.

2464 ELECTRIC FIXTURES:

Supply whatever electric fixtures and signs are missing.

ROOFING:

The roof is to be gone over carefully for leaks and completed where necessary together with necessary louvres in top of shaft of incinerator flue. Furnish and install any pieces of terra cotta copings that might be missing.

KITCHEN CABINETS:

2465 Supply all missing drain boards and also missing closure pieces at top and sides of cabinet together with any parts of cabinet that might be missing.

GLASS & GLAZING:

Supply all missing mirrors where necessary together with repairing breakage of glass where necessary.

ELECTROLUX REFRIGERATORS:

2466 The electrolux refrigerators are to be tested out in the individual apartments and made to work properly.

REFRIGERATING SYSTEM: & KITCHEN EQUIPMENT:

The above should be gone over and tested out.

PAINTING:

All of the apartments and the elevator vestibules are still to be finished and also all stair treads and landings to receive (2) coats of cement paint. The walls of all stairs should have a dado stripe. The lobby will have to be gone over and re-touched up.

INCINERATOR: 2467

In the incinerator room in the cellar there is a leakage of water which will either have to be taken care of or properly drained.

MISCELLANEOUS:

All necessary cleaning and removal of rubbish should be taken care of and also any leaks in the steam system, water and drainage systems that may be necessary.

R. E. BILLSBORROW

February 14th, 1931 2468

REB:FG

PLAINTIFF'S EXHIBIT 64 FOR IDENTIFICATION.

Mr. Braislin:—

Re CENTRAL PARK PROPERTIES, INC.—Central Park South, S/S running through to West 58th Street, 100' east of 7th Avenue, Manhattan, N. Y.

The following is a list of the unfinished work in the above building:— 2469

I have not included anything under the items of plumbing and heating, the turning on of the water and steam risers, etc., as they were cut off when we tried to cut down on the steam consumption. I feel that these are more properly an item of maintenance. When the time comes for occupancy, it will of course, be necessary to turn on the water and the steam and also re-adjust the

2470 pressure reducing valves and remove from all of the ventilating fans burlap bagging which I had installed in order to keep out the cold.

WATERPROOFING:—

While this item was supposed to have been completed as far as they maintained, we find now that water seeps in both the incinerator room and elevator pits.

This item should be taken care of by the installation of a membrane waterproofing.

ORNAMENTAL IRON & BRONZE:—

2471 There is a grill missing in the vestibule on the first floor also two transoms over store doors on the 58th Street side and the bronze screen doors opening into the dining room and lobby, etc., should be adjusted.

MASONRY:—

There are some places on the offset roof where the terra cotta copings have been knocked off and should be replaced.

PLUMBING:—

2472 Shower curtains are missing throughout the building and also some miscellaneous fittings such as soap dishes, valves, etc., that were evidently stolen. There is also the item of replacing fixtures that have been damaged during construction.

ELECTRIC WORK:—

Supply and install all missing receptacles, switches, plates, etc., that have been stolen as

well as test out the lighting, fire alarm sys- 2473
tems, etc.

ELEVATORS:—

Elevators are to be complete so as to turn same over to owners.

SHOWER DOORS:—

There are a few pieces of moulding in connection with installation missing.

METAL WINDOWS:—

Daylight shows through at places where two double hung windows are adjoining each 2474
other. Glazing beads will have to be replaced where missing. Some of the hardware on the windows and casement doors leading to offset roofs will have to be replaced.

GLASS:—

Supply all missing and replace all broken and defective mirrors in the mirror doors. Replace all broken glass throughout the building.

SHEET METAL WORK & ROOFING:—

The roof is to be gone over carefully for 2475
leaks. Louvres should be installed in the top of the incinerator flue. Some roofing on offset at the second floor level on the east side should be completed. There is also an opening between the new and the adjoining building from the second to the twelfth floor which should be flashed

2476 GUARANTEE?

CEMENT WORK:—

Install cement floor and base in the east store on 58th Street. This item was never done due to the fact that Lefcourt had expected to rent it to a barber who would have had to rip up the floor for the purpose of installing plumbing fixtures, etc.

Kella stone carpet stripping is to be installed in all places where carpet is to be used.

CABINET WORK IN LOBBY:—

2477 This work has warped in places and should be repaired. The reason for warping (except for applying it too soon in a damp building) could be explained by stating that the work had not been waxed and rubbed down which would have kept out some of the moisture.

DOORS:—

There are some double acting doors to be hung in the duplex apartments and also on some of the lower floors there are some damaged and partly warped doors. Same will
2478 have to be replaced and all doors should be gone over with the idea of adjustment.

PLASTERING:—

There is still the item of plaster patching throughout the building and the finishing of the stores.

CARPENTRY FINISH:—

In some of the rooms the panel moulding on the walls has not been finished and also in places it has been damaged.

FINISHED HARDWARE:— 2479

Complete the installation of lock sets in the duplex apartments. There is also the item of stolen locks throughout the building. The keys should be sorted out on a suitable key board and the owners furnished with master keys for the respective floors, service portions, etc., together with a grand master key for the whole building.

There is also a portion of the closets which have not as yet received clothes hooks and poles.

INTERIOR MARBLE:— 2480

Clean marble work in lobby.

TILE WORK:—

The tile work is practically complete but here and there are broken accessories and patching around switch plates, etc., of a minor nature that will have to be done.

All the TERRAZZO of the main lobby, etc., on the first floor has yet to receive it's final rubbing and polishing.

APARTMENT ICE BOXES:— 2481

These have all been installed and were being tested when we shut off the water so the Consolidated Gas Company will have to finish same. The boxes for ice cubes are on the job.

PAINTING:—

All cement stair landings and treads will have to be finished with two coats of cement paint;

2482 dado stripe on all stairs; exposed facias and portions of elevator shafts to receive one coat of asphaltum; cellar work two coats; three coats of stipple finish on walls in elevator vestibules and apartment rooms; three coats of enamel finish on walls and ceiling of all baths, pantries, kitchens, doors, trim, windows, cement base, etc.; three coats in closets; kalsomine all ceilings except baths and pantries; all necessary signs required by law; floor numbers on all elevator and stair shafts; apartment numbers on all apartments; all service rooms to be suitably lettered. Deduct
2483 for work previously completed, for example the walls of most rooms have received two coats and at present they would have to be sparkled, then receive one coat of size and one coat of stipple finish.

Also rectify all poor kalsomining and painting work. Parts of the main lobby, etc., will have to be touched up and the cabinet wainscoting has yet to be waxed and rubbed down.

Wood Floors:—

The wood floors in the duplex apartments,
2484 main dining room and smaller dining rooms have opened up in some cases and will have to be gone over and also receive their finish coat of varnish and be protected with paper.

Lighting Fixtures:—

Replace all missing and broken fixtures.

Main Kit. Equipment & Refrigerating

PLANT:—

2485

The above should be gone over and made complete in every way.

MEDICINE CABINETS:—

Replace all damaged boxes, mirrors, etc. Also supply glass shelves.

KITCHEN CABINETS, ETC.

There are some drain boards missing and closure pieces on top of hanging closets.

MISCELLANEOUS:—

All necessary cleaning and removal of rubbish should be taken care of and also any leaks in steam, water and drainage system that might occur. 2486

R E B.
R. E. BILLSBORROW

February 20th, 1931

REB:FG

PLAINTIFF'S EXHIBIT 65 FOR IDENTIFICATION.

Mr. Goodnough: 2487

Re: Central Park Properties, Inc.,
New York.

The following work is still to be done in the above building:

1 WATERPROOFING:

All waterproofing is to be completed, particularly the installation of a membrane water-

2488 proofing in the incinerator room and elevator pits.

2 ORNAMENTAL IRON & BRONZE:

All ornamental iron and bronze work is to be completed. There is a grill missing in the vestibule on the first floor, and there are two transoms over store doors on the 58th Street side still to be put in. The bronze screen doors opening into the dining room and lobby, etc. are not properly adjusted, and this should be done.

2489 3 MASONRY:

The masonry work is still incomplete, and the terra cotta copings are incomplete on the offset roof.

4 PLUMBING:

All plumbing work should be completed. There are no shower curtains in the building, and there are still several fittings such as soap dishes, valves, etc., which have not yet been installed. There are several plumbing fixtures which were damaged and should be replaced.

2490 5 ELECTRIC WORK:

The electric work is still incomplete. There are many receptacles, switches, plates and fixtures still to be installed, and the lighting, fire alarm systems, etc. have not yet been tested.

6 ELEVATORS:

All elevator work is to be completed so that the elevators are in running order and entirely completed.

7 SHOWER DOORS: 2491

There are several pieces of moulding in connection with the shower doors which have not yet been installed.

8 METAL WINDOWS:

The installation of metal windows is incomplete where two double hung windows are adjoining each other, no caulking of any kind has been put in the joints. Glazing beads will have to be replaced where necessary. Some of the hardware on the casement doors leading to offset roofs, and on the windows are missing and will have to be put in. 2492

9 GLASS:

All broken glass and all missing glass throughout the building should be replaced and installed. There are still several mirrors in the mirror doors missing, and also several defective mirrors in mirror doors should be supplied with perfect mirrors.

10 SHEET METAL WORK & ROOFING:

All roofing work is to be entirely completed and all work previously done is to be gone over carefully for leaks. Louvres should be installed in the top of the incinerator flue. Some roofing on offset at the second floor level on the east side should be completed. There is also an opening between the new and the adjoining building from the second to the twelfth floor which should be flashed. 2493

11 CEMENT WORK:

All cement work is to be finished. No cement floor or base has yet been installed in the east

2494 store on 58th Street. This work should be done. No carpet stripping has been installed in any part of the building. Carpet stripping should be installed in all rooms and places where carpet is to be used.

12 CABINET WORK IN LOBBY:

The cabinet work in the lobby was never finished in that it was never waxed and rubbed down. For this reason, moisture got into the wood and several pieces have warped so badly that they will need repairs.

2495 13 DOORS:

All doors are to be completed throughout the building. There are some double acting doors to be hung in the duplex apartments, and there are some imperfect and damaged doors on the lower floors which will have to be replaced. The final adjustments on all doors have never been made.

14 PLASTERING:

All plastering is to be finished. There is still a good deal of plaster patching to be done throughout the building, and there is still
2496 plaster work to be finished in the stores.

15 CARPENTRY FINISH:

All carpentry work is to be finished. In some of the rooms the panel moulding has not been finished, or has been so badly damaged in being put up that it will have to be replaced.

16 FINISHED HARDWARE:

All hardware is to be finished and all locks are to be completed throughout the building,

and furnished with keys. There are some lock sets still to be installed in the duplex apartments. The keys to all locks should be sorted out on a suitable key board, and there should be master keys for the respective floors, service portions, etc. together with grand master key for the whole building. Also some of the closets have never received clothes hooks and poles. 2497

17 INTERIOR MARBLE:

The marble work in the lobby is still to be cleaned.

18 TILE WORK: 2498

There is still some tile work to be done, such as patching around switch plates, etc. and the completion of the installation of tile accessories.

19 TERRAZZO:

All of the terrazzo of the main lobby, etc., on the first floor has yet to receive its final rubbing and polishing.

20 APARTMENT ICE BOXES:

All the refrigerators will have to be put in perfect working condition and completely furnished with proper accessories. 2499

21 PAINTING:

All painting work is to be finished. All apartment rooms are to receive three coats of stipple finish on walls. All elevator vestibules are to receive three coats of stipple finish also. All cement stair landings and treads

2500 will have to be finished with two coats of cement paint; dado stripe on all stairs; exposed facias and portions of elevator shafts to receive one coat of asphaltum; cellar work two coats; three coats of enamel finish on walls and ceiling of all baths, pantries, kitchens, doors, trim, windows, cement base, etc.; three coats in closets; kalsomine all ceilings except baths and pantries; all necessary signs required by law; floor numbers on all elevator and stair shafts; apartment numbers on all apartments; all service rooms to be suitably lettered. Deduct for work previously com-
2501 pleted, for example the walls of most rooms have received two coats and at present they would have to be sparkled, then receive one coat of size and one coat of stipple finish. There is also a good deal of painting work and kalsomining work which has been poorly and unsatisfactorily done, such work will have to be redone. Parts of the main lobby etc. will have to be touched up and the cabinet wainscoting will have to be waxed and rubbed down.

22 WOOD FLOORS:

2502 The wood floors in the duplex apartments, main dining room and smaller dining rooms have opened up in some cases and will have to be gone over and also receive their finish coat of varnish and be protected with paper. All wood floors are to be completed.

23 LIGHTING FIXTURES:

All lighting fixtures are to be completed and all broken fixtures are to be replaced.

24 MAIN KITCHEN EQUIPMENT & REFRIGERATING PLANT: 2503

The main kitchen equipment and the refrigerating plant are to be entirely completed, and the refrigerating plant put in running order.

25 MEDICINE CABINETS:

All missing medicine cabinets are to be installed, and all damaged boxes, mirrors and missing glass shelves are to be supplied and replaced.

26 KITCHEN CABINETS: 2504

All kitchen cabinet work is to be completed. There are some drain boards missing, and closure pieces on top of hanging closets are to be installed.

27 MISCELLANEOUS:

All the necessary cleaning and removal of rubbish should be done. The steam, water and drainage systems should be tested for leaks.

February 24th, 1931.

2505

Defendants' Exhibit C.

[LETTERHEAD OF THE PRUDENCE COMPANY, INC.]

November 6th, 1930

Central Park Properties, Inc.,
Mr. Abraham Lefcourt, Pres.,
1359 Broadway,
New York, N. Y.

Re: Central Park South, S/S running through to W. 58th Street, 100' east of 7th Avenue, Manhattan, N. Y.

Gentlemen:–

We think the finish of the kalamein work could be improved upon especially in such cases as the ends of the window sills and the mullion casings.

This has been explained to your superintendent on the job, but so far nothing has been done concerning same.

Trusting you might look into the above matter, we beg to remain

Yours very truly,

THE PRUDENCE COMPANY, INC.
By– R E BILLSBORROW
R. E. Billsborrow
Engineering & Inspection Dept.

REB:FG

Defendants' Exhibit D.

November 7th, 1930. 2509

The Prudence Company, Inc.,
162 Remsen Street,
Brooklyn, N. Y.

Re:– Central Park Properties
58th-59th Sts.

Gentlemen:–

We are in receipt of your favor of the 6th instant, calling our attention to the kalamein work, and we wish to say that the matter has already been remedied, and we trust a re-inspection will find it to your satisfaction. 2510

We are certainly gratified to feel that during the entire construction of the building, this is the first letter we have received from you commenting on any of the work so far installed at the building, and we consider it very good for the reason that we take it for granted that had you found anything to criticize before this, we would have heard from you.

Again assuring you of our willingness to cooperate with you at all times, and thanking you for calling our attention to the kalamein work, we remain 2511

Yours very truly,

CENTRAL PARK PROPERTIES, INC.

By _____

Secretary.

LH:EB.

Defendants' Exhibit E.

2512

November 13th,
1930.

Mr. Henry Mark,
c/o The Prudence Company,
331 Madison Avenue,
New York City.

Dear Mr. Mark:–

At the request of Mr. Louis Haas, we are enclosing herewith, photostatic copy of the contract
2513 of the Consolidated Gas Company of New York covering the ice boxes.

Very truly yours,

CENTRAL PARK PROPERTIES, INC.

By: _____
Vice President

MB:AL

2514

Defendants' Exhibit F.

April 10th, 1930. 2515

Prudence Co.,
162 Remsen Street,
Brooklyn, N. Y.

Re:– Central Park Properties
Att. Mr. W. G. Walters, Eng. Dept.

Gentlemen:–

As requested, we are handing you herewith the following mechanical plans and specifications:–

1. Electric Work
2. Plumbing Work
3. Heating & Ventilating

2516

Also for your use Norwalk Lock Co.'s general catalog, together with a descriptive specification covering the hardware which is to be installed in the above building.

Very truly yours,

CENTRAL PARK PROPERTIES, INC.

By L HAAS
Secretary.

2517

K

EHK:LS

NOTE: Defendants' Exhibits G (the heating and ventilating plans enclosed in the foregoing letter) and H (plan of certain alterations made by The Prudence Company, Inc., to the first floor of the building) are omitted from the printed record pursuant to stipulation and order (*supra*, p. 565).

Defendants' Exhibit I.

2518 AGREEMENT made the 27th day of April, 1931 BETWEEN 58-59 REALTY CORPORATION hereinafter called the builder, and LANDSMAN BROS & SOFFIN, hereinafter called the contractor.*

* * * * * * * * *

Contractor's Address—129 East 124th Street, New York City.

Builder's Address—160 West 59th St, N. Y. City.

Architect—Frank Grad, 1023 Broad Street, Newark, N. J.

2519 *Description of Building*—One forty story hotel building with basement and pent houses, situated at 160-170 West 59th Street and 155-165 West 58th Street, Borough of Manhattan, City of New York —size of plot being 206'4" x 200'10".

Labor and Materials to be furnished by contractor—For finishing all painting, according to the specifications prepared by Frank Grad, Architect, under date of May 31st, 1929, and attached hereto, plus one additional coat of flat paint on walls of all living rooms, chambers, foyers, private halls, public corridors and elevator lobbies, plus two coats of cement floor paint in all closets, stair
2520 halls, stair treads and platforms, servants' rooms, service corridor on second floor, office rooms on mezzanine floor, all cellar floors and all machine and elevator rooms throughout the building, all as proper and necessary in a building of this character.

Contract Price: NINETY THOUSAND EIGHT HUNDRED and 00/100 (90,800) DOLLARS.

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* Formal portions of this contract not material to this suit, are omitted from the printed record, pursuant to stipulation and order (*supra,* p. 565).

Contract for Completion of Painting

It is understood and agreed that the additional coat of flat wall paint on the walls of living rooms, chambers, etc. etc. specified above, is necessary because of the fact that no sparkling has been done between the present prime and second coats and also because the present second coat has lost its adhesive qualities, due to the length of time that has elapsed since its application. 2521

Should builder require painting for the entire building to be completed according to the specification with addenda prepared by the 58-59 Realty Corporation, and attached hereto, instead of specification of Frank Grad, above referred to, there shall be DEDUCTED from the above price the sum of $19,150 2522

made up as follows:

For not washing off kalsomine from all ceilings and painting with three (3) coats of flat paint, *Deduct*	$32,000	
For omitting one coat of flat enamel undercoat and one coat of long oil enamel from walls and ceilings of all guest bathrooms *Deduct*.....	2,700	2523
For omitting two coats of flat wall paint final coat stippled, from the walls of all public corridors and elevator lobbies *Deduct*	4,200	
TOTAL DEDUCTIONS		$38,900

Contract for Completion of Painting

2524 *Additions*:

For sparkling all walls due to the removal of panel moulding throughout the building—*Add*		$5,000
For hanging lining paper, wall paper and applying one coat of gelatin and one coat of varnish thereto on walls and ceilings of all guest bathrooms	*Add*	$2,700.00
2525 For painting required because of alteration to 1st. floor, basement and mezzanine and in service elevator shaft #1, as per specification attached	*Add*	600.00
For hanging lining paper and wall paper on the walls of all public corridors and elevator lobbies and applying one coat of gelatin and one coat of varnish	*Add*	6,500.00
2526 For removing the kalsomine from ceilings of all public corridors and elevator lobbies, varnish sizing where required and rekalsomining with color as selected	*Add*	1,600.00
For removing the kalsomine from ceilings of all furnished apartments—(see list in specification attached), varnish siz-		

ing where required and rekalsomining with color to match walls ..... *Add* 3,350.00 2527

Total Additions $19,750.00

Net Deductions $19,150

For sizing walls, hanging lining paper and wall paper in bed rooms, living rooms and foyers, the following additional unit prices shall prevail, irrespective of size: J H L

Bed rooms	$8.00
Living rooms	9.00
Foyers	3.00

2528

For foyers larger than 9′ x 11′, or larger than 12′ in any one dimension 8.00

These prices are based upon paper costing $1.10 per roll.

Note: The above prices for bed rooms and living rooms, include all spaces adjacent to same, except foyers. 2529

For removing existing kalsomine from living rooms or chamber ceilings, varnish sizing where required, and rekalsomining with color to match walls ..... *Add* *$8 per room,*

this price to include foyers, private halls, passages, en-

2530 tries, etc. adjacent to said rooms.

For painting of wall of adjoining building as called for in Alternate #4 in specification prepared by 58-59 Realty Corporation and attached hereto ..... *Add* $750.00

The price for hanging wall paper in all public corridors and elevator lobbies is based on the use of paper costing not
2531 more than $1.10 per roll plus one coat of gelatin and one coat of varnish. J H L

If Salubra Type paper, costing $1.50 per roll is substituted, also using lining paper and one coat of gelatin and varnish ..... *Add* $1,000.00

The above noted price ($2,700) for applying one coat of size, hanging lining paper and
2532 wall paper, and applying one coat of gelatin and one coat of varnish to all walls and ceilings of all guest bathrooms, is based on the use of wall paper costing not more than $1.10 per roll. If lining paper is omitted, instead of $2,700, the additional price shall be 1,610.40

If Salubra type paper, valued at $1.50 per roll is substituted, also hanging lining paper and applying one (1) coat of gelatin and one (1) coat of varnish, instead of $2,700.00 the additional price shall be 3,400.00 2533

If Salubra type paper and lining paper is used and gelatin and varnish omitted, instead of $2,700, the additional price shall be ..... 2,900.00 J H L 2534

Note: The above prices for additions and/or deductions for changes in guest bathrooms are based upon a total of 687 baths. Should more than one of the above alternates apply to various bathrooms, a pro rata addition and/or deduction based on the 687 bathrooms shall apply to the number of bathrooms so involved.

Unless otherwise agreed, contractor is to perform any extra work, other than overtime work, ordered by the builder, on the basis of actual cost of labor and materials, plus .....% for overhead, plus.....% for profit, plus actual cost of Workmen's Compensation Insurance. 2535

Should overtime work be ordered by the builder, the builder will pay the contractor only the actual labor cost of said overtime work, plus Compensation Insurance on said additional labor.

Any extra or overtime work performed by subcontractors for the contractor is to be paid for by contractor on the same basis as specified above. In the case of overtime work, builder will then

2536 pay the contractor the exact cost of such overtime work performed by the sub-contractor.

such

In the case of / extra work, builder will pay the contractor the cost of such extra work, plus ten per cent (10%) to cover handling charges.

Time of Payment—Eighty five percent (85%) as the work progresses.

The balance within 60 days after the completion of all work, including patching and the furnishing of missing material.

Time of Performance of agreement—Contrac-
2537 tor agrees to completely finish all guest rooms, adjacent spaces and public corridors and elevator lobbies within six (6) weeks from date of this contract. The remaining work, for fully finishing the entire job, shall be completed within two (2) weeks thereafter. The contractor shall employ a sufficient number of men to accomplish the work in this contract within the above stated time, it being distinctly understood that TIME IS OF THE ESSENCE OF THIS CONTRACT.

Contractor guarantees that the quality of the work under this contract will be equal to the best
2538 performed by them anywhere.

58-59 REALTY CORPORATION,
By A. S. LUKACH
A. S. LUKACH
Vice President.
H. A. FREY
President.

LANDSMAN BROS. & SOFFIN.
By JACOB H LANDSMAN

Defendants' Exhibit J.

THIS AGREEMENT 2539

made the 8th day of July One Thousand Nine Hundred and Thirty

BETWEEN

CENTRAL PARK PROPERTIES, INC.

of the State of New York, hereinafter for convenience designated as the Owner,

AND

THE GLOBE PAINTING & DECORATING CO., INC.,
358 Fifth Avenue,
New York City. 2540

hereinafter for convenience designated as the Contractor,

WITNESSETH:

The said Contractor hereby covenants, promises and agrees to and with the said owner for the consideration hereinafter named, to furnish all necessary, good proper and sufficient labor and materials of all kinds whatsoever as necessary for the performing, completing and finishing, including the setting in place of all painting work, etc. required in connection with the construction of 2541
the new building to be erected on premises known and designated as #155-165 West 58th Street and #160-170 West 59th Street, C. P. So. (all numbers inclusive) in the Borough of Manhattan, City of New York, State of New York, agreeably to the Drawings and Specifications (including General Requirements Specifications) prepared by Frank Grad, Architect, which Drawings and Specifications are hereby made a part of this agreement.

• • • • • • • •

Original Painting Contract

2542 And the said Owner hereby covenants, promises and agrees, to and with the said Contractor, in consideration of the covenants and agreements on the part of the Contractor, herein contained, being strictly performed and kept by the Contractor, as specified herein, to pay or cause to be paid unto the said Contractor the sum of Fifty-six Thousand ($56,000.00) Dollars.

. . . . . .

As an inducement for the Owner to enter into this contract with the Contractor, the Contractor guarantees and agrees to have all of the work as contained in this contract, completely finished not 2543 later than October 1st, 1930. Should, however, the building not be in a condition to allow the Contractor to complete his work, then the Contractor agrees to store the material, etc. in his premises until such time as the building is in condition for the Contractor to complete the contract.

ALTERNATE #1—Should the Owner decide to omit the final coat of paint from all tenants' quarters of the building herein mentioned, the Contractor agrees to allow the Owner to deduct the sum of Ten Thousand 2544 Three Hundred Twenty-one ($10,321.00) Dollars from the amount due him under this contract.

ALTERNATE #2—Should the Owner decide to omit the final coat of paint from the public and service corridors and the servants' and service rooms of the building herein men-

tioned, the Contractor agrees to allow the Owner to deduct the sum of Two Thousand Two Hundred Sixty Four ($2,264.00) Dollars from the amount due him under this contract. 2545

ALTERNATE #3—Should the Owner require this Contractor to paint the cement floors and base in the servants' rooms, stairways, service corridors and rooms, etc. of the building herein mentioned, the Owner agrees to pay the Contractor an additional sum of One Thousand Two Hundred Seventy-three ($1,273.00) Dollars. 2546

ALTERNATE #4—Should the Owner require the Contractor to grain the passenger elevator bucks similar in all respects to the graining on the elevator doors, and which graining on the bucks herein mentioned, must meet with the approval of the Owner, then the Owner agrees to pay the Contractor an additional sum of Two Hundred and Twenty ($220.00) Dollars. 2547

UNITS, ETC. IF REQUIRED.

This contractor agrees with the owner that unit prices for material under the scope of this con-

2548 tract shall be as mentioned herein. Should any additional units be required, they will be charged at prices herein mentioned, and should any of the units be omitted by the owner, the contractor agrees to allow a credit at within mentioned prices.

Units and prices are as follows:

		Addition	*Deduction*
1.	Three coats of lead and oil— per sq. ft.	$ .03¾	$ .03¼
2.	Two coats of lead and oil— " " "	.02¾	.02⅜
3.	One coat of size and two coats of flat wall paint, last coats stippled—per sq. ft.	.03½	.03
4.	One coat of size and two coats of flat wall paint, without stippling— per sq. ft.	.03	.02¾
2549 5.	One coat of size and two coats of lead and oil paint— per sq. ft.	.03¼	.02¾
6.	One coat of enamel undercoating, one coat of half undercoating and half enamel, and one coat of enamel— per sq. ft.	.03¾	.03¼
7.	One coat of cement undercoating and two coats of cement paint— per sq. ft.	.03¾	.03½
8.	Two coats of asphaltum paint— " " "	.03	.02½
9.	Stain, filler, one light coat of shellac and two coats of varnish rubbed— per sq. ft.	.14	.12
10.	Glaze finish exclusive of undercoats, per sq. ft.	.06	.05
11.	Two coats of cement paint— " " "	.02½	.02
12.	Enamel finish on exposed pipes, traps, etc., under lavatories, slop sinks, etc.— per fixture	.50	.40
13.	Gold Leaf Numerals with black liner, 2" high, each	.23	.21
14.	Craftex finish per sq. ft.	.20	.17
15.	Marbleizing cement base to imitate		
2550	A—Blue Belge— per lin. ft.	.12	.10
	B—Black and Gold— " " "	.14	.12
16.	Price per room for final coat of paint on walls, trim, etc. in colors selected by tenant, if previous color designated for any particular room is changed—	12.00	11.00

Defendants' Exhibit K.

April 8th 1931. 2551

Bing & Bing
119 West 40th St.,
New York City

Re: 160 West 59th St.
Att. Mr. A. S. Lukach

Gentlemen:

We estimate to furnish labor and material necessary to do the painting on the above job in accordance with the painting specifications for the sum of SIXTY-NINE THOUSAND EIGHT HUNDRED ($69800.00) DOLLARS. For the various alternate 2552
estimates add to the above amount the following prices.

Alternate	#1	add	$1800.00
"	#2	"	$8500.00
"	#3	"	$ 39.00
"	#4	"	$ 375.00
"	#5	"	$ 165.00

Respectfully submitted,

GLOBE PAINTING AND DECORATING CO INC.
By A GLADSTONE
Vice-Pres. 2553

In addition to jobs shown on letter head we have completed

Hotel Brittany
Apartment House 51 Fifth Ave.
Apartment House 325 East 79th St.
City Federation Hotel
120 Wall St.

We started the work on 160 West 59th St.

Defendants' Exhibit L.

2554

[Letterhead of The Prudence Company, Inc.]

January 11, 1930

Central Park Properties, Inc.
1359 Broadway,
New York, N. Y.

Att: Mr. Klein

Re:– Central Park So. S/S thru. to W. 58th St. 100′ E. 7th Av. Manhattan, N. Y.

Gentlemen:–

2555

Will you kindly forward to this office at your earliest convenience a copy of the lobby details for the above building.

We will require same for our approval and records.

Very truly yours,

The Prudence Company, Inc.
By– W. G. Walters
W. G. Walters, Ch. Eng.
Engineering & Inspection Dept.

WGW:FG

2556

Defendants' Exhibit M.

2557

[Letterhead of Frank Grad]

January 21, 1930.

Mr. Louis Haas,
Central Park Properties, Inc.,
1359 Broadway,
New York, N. Y.

Re: 59th Street Hotel,
First floor interior.

My dear Mr. Haas:

With regard to details of the first floor, for the Prudence Company, we are sending you a print of our sheets nos. 15, 16, and a smaller print showing the revised treatment for the corridor and the elimination of wood on the walls. This is the only change that we contemplate making from our original plans. 2558

I think this will be all that is necessary to satisfy the Prudence Company. Sheets nos. 15 and 16, show the wall and ceiling treatments of the public spaces and rooms on the first floor.

Yours very truly,

2559

Frank Grad
By J B Sanger.

JBS:RW

Defendants' Exhibit N.

2560

November 28th, 1930

Mr. Louis Haas, Treasurer
Central Park Properties, Inc.,
1359 Broadway,
New York, N. Y.

Re Central Park South, S/S running through to West 58th Street, 100′ E. of 7th Avenue—Manhattan, N. Y.

Gentlemen:–

We notice that the panel of the bedroom door
2561 on the 23rd floor in the southwest apartment is badly sprung.

Trusting you will have the above mentioned door fixed, we remain

Yours very truly,

THE PRUDENCE COMPANY, INC.
By– R. E. Billsborrow
Engineering & Inspection Dept.

REB:FG

2562

Defendants' Exhibit O.

2563

[Letterhead of the Prudence Company, Inc.]

December 17th, 1930

Mr. Louis Haas, Secretary
Central Park Properties, Inc.
1359 Broadway,
New York, N. Y.

Re Central Park So. through to W. 58th St.
east of 7th Ave., Manhattan, N. Y.

Gentlemen: 2564

We have previously written you regarding the daylight showing around some of the double hung windows in the above building and so far we have not been able to determine whether you have attempted to repair these or not. On going through the building yesterday, I noticed the daylight shows through around the following openings:—

41st Floor:—Southeast apartment.
40th Floor:—Northeast apartment in living room. 2565
38th Floor:—Southwest apartment in bedroom.
37th Floor:—In rear west apartment in bedroom.
36th Floor:—Southwest apartment in bedroom.
35th Floor:—Southwest apartment in bedroom.
34th Floor:—Rear west apartment in bedroom.

Defendants' Exhibit O

2566 33rd Floor:—Southwest apartment in bedroom.
Rear west apartment in living room.
32nd Floor:—In rear west apartment in bedroom.

Of course, the above list is not an examination of the whole building but I think it is sufficient to indicate that someone in your company should make a thorough examination of the windows and have same made tight. This light of which we speak comes in between the casings where two double hung windows occur together.

On the 41st floor I notice there are two bucks
2567 which were evidently reversed by mistake during erection and the opening for the old strike, etc., has never been patched up. I think this should be done before it is forgotten.

In the southwest apartment on the 38th floor there is a particularly poor piece of patching on the wall of the passage leading to the bedroom.

Trusting you will correct the above items as soon as possible, we beg to remain

Yours very truly,

2568 THE PRUDENCE COMPANY, INC.
By R E BILLSBORROW
R. E. Billsborrow
Engineering & Inspection Dept.

REB:FG

Defendants' Exhibit O

[LETTERHEAD OF THE PRUDENCE COMPANY, INC.] 2569

November 28th, 1930

Mr. Louis Haas, Treasurer
Central Park Properties, Inc.,
1359 Broadway,
New York, N. Y.

Re Central Park South, S/S running through to West 58th Street, 100′ E. of 7th Avenue —Manhattan, N. Y.

Gentlemen:— 2570

We notice that the panel of the bedroom door on the 23rd floor in the southwest apartment is badly sprung.

Trusting you will have the above mentioned door fixed, we remain

Yours very truly,

THE PRUDENCE COMPANY, INC.
By R E BILLSBORROW
R. E. Billsborrow
Engineering & Inspection Dept. 2571

REB:FG

Defendants' Exhibit O

2572 [LETTERHEAD OF THE PRUDENCE COMPANY, INC.]

November 21st, 1930

Mr. Louis Haas, Secretary
Central Park Properties, Inc.,
1359 Broadway,
New York, N. Y.

Re:—Central Park So. S/S running thru. to West 58th St. E. of 7th Avenue, N. Y. C.

Gentlemen:—

We think the plaster patching of the ceilings in
2573 the southwest bedrooms on the upper floors, evidently where a temporary water line passed through, could be improved upon. Some of these ceilings are in bad shape and the plasterer should be compelled to do them over; also the plaster patching of the cased openings could be improved upon in a number of cases.

Trusting you might see what could be done about the above condition, we beg to remain

Yours very truly,

THE PRUDENCE COMPANY, INC.
By R E BILLSBORROW
2574 R. E. Billsborrow,
Engineering & Inspection Dept.

REB:FG

Defendants' Exhibit O

[LETTERHEAD OF THE PRUDENCE COMPANY, INC.] 2575

November 30th, 1930

Mr. Louis Haas, Treasurer
Central Park Properties, Inc.,
1359 Broadway,
New York, N. Y.

Re: Central Park So. S/S running thru. to
West 58th St. 100′ east 7th Avenue.

Gentlemen:—

Upon our recent examination of the above building, we find that there are a number of heads over cased openings badly cracked and evidently are being passed up in the plaster patching; also there is a ceiling in the southwest bedroom on the 34th floor that is in rather poor shape. 2576

In the southwest bedroom on one of the upper floors there is an exposed pipe over the entrance door which should be taken care of; also on the 2nd floor in the corridor along the 59th Street side there is another exposed pipe that should be hidden by furring.

On the 39th floor on the northwest offset roof there is a hole in the cement finish alongside of the door to the living room through which water can enter. 2577

Trusting you will give the above items your immediate attention, we beg to remain

Yours very truly,

THE PRUDENCE COMPANY, INC.
By R E BILLSBORROW
R. E. Billsborrow
Engineering & Inspection Dept.

REB:FG

Defendants' Exhibit O

2578 [Letterhead of the Prudence Company, Inc.]

November 8th, 1930

~~Mr. Louis Hass, Sec'y.~~
Central Park Properties, Inc.,
1359 Broadway,
New York, N. Y.

Re: Central Park So. S/S thru. to W. 58th St. 100' East of 7th Avenue, Manhattan, N. Y.

Gentlemen:—

2579 In reply to your letter of November 7th, we might call your attention to the fact that where two double hung windows are adjacent to each other you can see daylight through the mullion in a majority of cases. We also noted at the sides of the windows there is a number of cases where the corner bead has not been returned down to the top of the sill.

Trusting you might go further into this matter, we beg to remain

Yours very truly,

The Prudence Company, Inc.
2580 By R E Billsborrow
R. E. Billsborrow
Engineering & Inspection Dept.

REB:FG

Defendants' Exhibit O

November 10th, 1930. 2581

The Prudence Company, Inc.,
162 Remsen Street,
Brooklyn, N. Y.

Attention of Mr. R. E. Billsborrow
Engineering & Inspection Dept.

Re:—Central Park So.
58th-59th Sts.

Gentlemen:—

We have your favor of the 8th instant, and beg 2582
to say that we immediately referred same to our Superintendent of Construction, instructing him to give the matter his prompt attention.

Trusting you will find this satisfactory, we remain

Yours very truly,

CENTRAL PARK PROPERTIES, INC.
By _____
Secretary.

LH:EB.

2583

Defendants' Exhibit O

2584 [Letterhead of the Prudence Company, Inc.]

April 8th, 1930

Central Park Properties, Inc.,
1359 Broadway,
New York, N. Y.

Attention of Mr. Klein

Re: Central Park So. running thru.
to West 58th Street—Manhattan.

Gentlemen:—

Upon my visit to the above operation on Mon-
2585 day, April 7th, I noticed a load of tubs being delivered to the job.

You will recall our letter of the 15th ultimo, wherein we stipulated that the enamel-ware was to be of acid resisting enamel.

The tubs being delivered are not in accordance with the above stipulation. We therefore, instructed your superintendent to stop deliveries and installation of same.

Trusting you will give the above matter your immediate attention, we remain

Very truly yours,

2586 The Prudence Company, Inc.
By W. G. Walters
W. G. Walters, Ch. Eng.
Engineering & Inspection Dept.

WGW:FG

Note: Defendants' Exhibit P (heating contract) is omitted from the printed record pursuant to stipulation and order (*supra*, p. 565).

Defendants' Exhibit Q.

A. E. LEFCOURT PROPERTIES 2587

CREDITORS' AGREEMENT
FEBRUARY 1, 1931.

—o—

AGREEMENT made as of February 1, 1931, between A. E. LEFCOURT, of New York City, (hereinafter called "Mr. Lefcourt"), party of the first part; ALEF CORPORATION, a Delaware corporation (hereinafter called the "New Corporation"), party of the second part, and the undersigned creditors of Mr. Lefcourt (hereinafter called the "Creditors"), parties of the third part, 2588

WITNESSETH:

WHEREAS, Mr. Lefcourt is indebted to banks, contractors and other creditors on direct indebtedness, endorsements and guaranties, but has assets, which, if properly handled and administered over a course of time, it is hoped will enable Mr. Lefcourt to pay his creditors in full, and

WHEREAS, under present business conditions the liquidation of the assets in sufficient time to enable him to meet his obligations as same become due is doubtful, and 2589

WHEREAS, it is necessary that Mr. Lefcourt and various of his Companies receive an extension of time for the payment of their liabilities in order that no creditor may receive a preference, and in order that the property and business of the said Companies may be conserved in the interest of the Creditors and Mr. Lefcourt,

Defendants' Exhibit Q

2590 NOW, THEREFORE, in consideration of the premises and of the agreements and mutual covenants of the several parties signatory hereto, it is agreed between the parties as follows

FIRST: This agreement is based upon a Plan of Reorganization, a copy of which Plan is annexed hereto and made a part hereof. The Plan contemplates the formation of a New Corporation (the various existing corporations being hereinafter referred to as the Old Companies) and the transfer of assets and liabilities as therein stated, all of which is hereby ratified and approved by
2591 the parties hereto.

SECOND: There shall be a joint committee representing the contractor creditors and the bank creditors consisting of two representatives of each class. The contractors' representatives are hereby designated as Mr. Geo. J. Atwell and Mr. A. J. Rhodes, and the bank representatives are hereby designated as Mr. Milton Billmire and Mr. Arthur Boyd. In the event of the inability to act on the part of any member of the Joint Committee, then other members shall be elected to act in their place. Any new member of the committee repre-
2592 senting the Contractors shall be designated by a majority in number of the five largest contractor creditors, and any new bank representative shall be designated by a majority in number of the three largest bank creditors.

THIRD: The Joint Committee shall have power to carry out the intent and purpose of the aforesaid Plan of Reorganization and in connection therewith (and with the approval of Mr. Lefcourt) may make such modifications or additions thereto

as it may deem advisable, provided, however, that 2593
no such addition or modification shall materially change the rights and benefits conferred upon the creditors under the aforesaid Plan. The Joint Committee shall have power to add to its number; to compromise and pay claims or lawsuits (for or against Mr. Lefcourt or the Companies); to continue or discontinue the operation of the business of any or all of the Old Companies or the New Corporation, and to take any action with respect to the management of the property and assets of any of the Companies which it may decide to be for the best interests of the Creditors. In the event that the Joint Committee shall deem 2594
it advisable to have the New Corporation borrow money for the maintenance and operation of the business, it is agreed that all such loans made to the New Corporation and all expenses and indebtedness incurred in the maintenance or operation of its business after the date of this agreement, shall be entitled to first payment out of the assets of said New Corporation, and it is further agreed that the New Corporation, with the consent of the Committee may secure any of said new loans or obligations incurred by it or for its benefit, by a pledge of any assets of said New Corporation 2595
available for that purpose.

FOURTH: It is contemplated that upon this agreement going into effect, such of the present members of the Board of Directors and officers of the Old Companies as the Committee may request, shall execute and deliver to the Committee their resignations. The Committee shall have power to cause these resignations to be accepted and new Directors or officers to be elected. Members of

2596 the Joint Committee or their nominees may serve as Directors or officers of the Old Companies or the New Corporation.

The Joint Committee shall have full authority to take any and all measures necessary to enable it to manage the business and property of the New Corporation and to supervise and direct the conduct of its affairs and to carry on the business of the New Corporation in such manner and for such length of time as it may deem advisable.

The Joint Committee shall from time to time report to the Creditors as to the condition of the New Corporation.

2597

FIFTH: The Joint Committee shall have full power to pass upon, adjust, fix and determine any and all claims by or against the Old Companies and the New Corporation.

The Joint Committee shall have power to pay in full all current operating expenses of the Old Companies and the New Corporation including all accrued and accruing charges for insurance, for accountancy and for legal services, including counsel for Mr. Lefcourt.

SIXTH: No creditor becoming a party hereto,
2598 shall, until the termination of this agreement, take any action whatsoever against the Old Companies or the New Corporation or Mr. Lefcourt, but shall abide by the provisions of this agreement in all respects. No creditor shall transfer or assign any claim against the Old Companies or the New Corporation, in whole or in part, to any other person or corporation, except subject to the terms of this agreement.

SEVENTH: Upon this agreement being declared effective, the creditors shall immediately forward

Defendants' Exhibit Q

to the New Corporation at 1359 Broadway, New York City, an itemized statement of their claims as of February 1, 1931. As soon as the claims are fixed and determined in pursuance of the terms of this agreement, the New Corporation shall execute and deliver to each of its creditors promissory notes of the New Corporation, dated February 1, 1931, for the amount of the indebtedness so fixed. 2599

Said notes may, at the request of the respective creditors, be issued in such denominations or amounts as each creditor may desire so as to make same available for the creditors needs.

Said notes shall be payable February 1, 1933, and shall bear this notation: "This note may at the option of the maker be renewed for consecutive periods of six months each, but not longer in the aggregate than two years from February 1, 1933." 2600

Interest upon the indebtedness as represented by the notes (and as reduced from time to time by partial payments) shall accrue from February 1, 1932, at the rate of 5% per annum. Should said notes be paid in full, then the amount of accrued interest shall be paid by the Alef Corporation giving to each noteholder its five year notes therefor. 2601

The New Corporation, with the approval of the Committee, shall from time to time make payments on account of the said notes, but all said payments shall be pro rata and the payment indicated on the notes; and in any distribution of income or assets, whether in liquidation or otherwise, all charges, expenses, and indebtedness, which according to the provisions of this agreement, are to be first met, shall be first paid or

2602 proper provision made therefor, and any moneys applicable for distribution upon the notes issued pursuant hereto, shall then be applied pro rata upon such notes until they are paid.

EIGHTH: Each creditor (except as otherwise provided in the Reorganization Plan) shall receive and accept such notes in lieu and stead of its claim and shall simultaneously therewith deliver to the New Corporation for cancellation all notes and other obligations of the Old Companies and/or Mr. Lefcourt which the creditor holds. Should any creditor have discounted or transferred notes
2603 or obligations of the Old Companies or of Mr. Lefcourt with banks or third persons, then notes of the New Corporation will be issued in lieu of the claims represented by such notes and/or obligations only upon their surrender to the New Corporation.

NINTH: For the purpose of carrying out the intent of this agreement, Mr. Lefcourt shall transfer to the members of the Joint Committee as voting trustees the shares of stock of the New Corporation which are to be issued as part consideration for the transfer of assets. The voting
2604 trust shall run for the period of five years or until all of said notes are paid, whichever period shall be the shorter, and shall provide that the voting trustees are to vote for directors of the New Corporation, of whom two shall be representatives of the contractors, two shall be representatives of the banks and one shall be Mr. Lefcourt or his designee.

Wherever reference is made to the operation of the business by the Joint Committee, it is contem-

plated that such operation shall be by the New Corporation which the Joint Committee shall control through its control of the Board of Directors. The only limitations imposed upon the Board of Directors in regard to the sale of any of the assets of the New Corporation are as follows: 2605

(a) None of the real estate of the New Corporation shall be sold prior to February 1, 1933, without the consent of all five directors;

(b) None of the mortgages owned by the New Corporation shall be sold for less than 80% of their face value without consent of all five directors; 2606

(c) None of the securities to be held by the New Corporation shall be sold for less than 80% of their market value at the time same are transferred to the New Corporation, without consent of all five directors.

TENTH: It has been provided that creditors shall present their claims at the office of the New Corporation at 1359 Broadway, New York City.

In connection with claims against the Old Companies or the New Corporation which are based upon guaranties made by Mr. Lefcourt and/or any of the Old Companies, which guaranties have not ripened into valid claims, the New Corporation shall set aside an amount of notes sufficient to cover any contingent claim as and when same ripens into a legal claim. The Joint Committee shall have full power to compromise and adjust any such contingent claims and shall have power 2607

2608 to determine when such contingent claims have ripened into legal claims.

ELEVENTH: The Joint Committee shall have full power to employ and compensate counsel, auditors, accountants, and all necessary assistants, for services rendered since the Committees have been working on this Plan, and to be rendered in and about the matters mentioned in this agreement, including the preparation thereof, and may incur any and all expenses deemed reasonable by the Committee in the premises, including proper compensation to the officers and directors of the
2609 New Corporation, all of which the New Corporation agrees to pay and the same shall be a prior charge upon the assets of the New Corporation.

The Joint Committee may adopt its own rules of procedure and may act either by vote at a meeting or by consent in writing, and may determine from time to time what number of votes or consents of its members shall be deemed to be the act of the Joint Committee.

TWELFTH: No member of the Joint Committee shall, in any way, be held personally responsible for any act, deed or omission by the Joint Com-
2610 mittee of which he is a member, or of himself as a member of said Committee, or for any act or omission of any agent or representative, but shall be responsible only for his own misconduct or malfeasance. No member of said Committee nor the Committee as a whole shall be under liability to render an accounting, but the reports of its accountants shall, at all reasonable times, be available to the Creditors.

THIRTEENTH: Any member of said Committee appointed hereunder may at any time resign upon

written notice to the Chairman of said Committee, and said Committee may fill any vacancy that may occur in said Committee, and such appointee shall have the same authority and powers as though originally named herein. Any member of said Committee who resigns therefrom shall also resign as voting trustee of the stock of the New Corporation, in the manner provided in the voting trust agreement under which he is acting as such trustee. 2611

FOURTEENTH: Upon the payment and satisfaction of all notes and renewals issued pursuant hereto, and the payment of all other obligations provided for herein, or upon proper provision being made therefor satisfactory to said Committee, said Committee and the individual members thereof, or its nominees, will thereupon resign as directors or officers of the New Corporation and will return the management of the property to its former stockholders, and said Committee shall thereupon cease to exist. 2612

FIFTEENTH: A complete copy of this agreement, bearing copies of all signatures, shall be deposited with each member of said Committee, with Simpson, Thacher & Bartlett, 120 Broadway, New York City, and Almuth C. Vandiver, 535 Fifth Avenue, New York City, (counsel to the Contractors' Committee), and Henry W. Pollock, 535 Fifth Avenue, New York City, and Kaye, McDavitt & Scholer, 149 Broadway, New York City, (Counsel to the Banks' Committee), for the inspection of any of the creditors. 2613

SIXTEENTH: This agreement shall go into effect when signed by such creditors of and claimants

against the Old Companies as shall be satisfactory to said Committee and Mr. Lefcourt, and said Committee shall thereupon declare the agreement operative.

SEVENTEENTH: This agreement may be signed in multiple with the same force and effect as if all the signatures thereto were upon one paper. It shall be binding upon the heirs, executors, administrators, successors and assigns of the parties hereto. Wherever the word "it" is used in referring to a creditor, it shall be taken to include a person male or female, firm or corporation, who is a creditor signatory hereto.

EIGHTEENTH: It is understood that it is the intention of this agreement that said Committee may exercise the powers herein conferred through advice, counsel, or instructions to the directors and officers of the New Corporation, who may be members of said Committee or its nominee and through such powers as may be conferred upon them as voting trustees of stock of the New Corporation.

NINETEENTH: The members of said Committee heretofore appointed and whose appointment is hereby confirmed, join in the execution of this agreement solely for the purpose of evidencing their assent to serve on said Committee and their agreement and concurrence in the provisions hereof.

TWENTIETH: Upon the Committee declaring the Plan effective, and upon the transfer of the assets as herein provided, the New Corporation shall and hereby does assume the payment of all

the liabilities appearing on Schedule A, and agrees 2617
to hold the said Abraham E. Lefcourt harmless of and from any liability thereon or therefor as provided for in this agreement and as noted on Schedule A.

WITNESS, the signatures of the parties hereto as of the day and year first above written.

ALEF CORPORATION,

By_____, Pres.

This agreement is executed and delivered to 2618
the Committee by the undersigned simultaneously with the execution and exchange of the agreement between the undersigned and the Committee herein named, and on the understanding that the claim of the undersigned, hereinafter stated opposite its signature, is to be secured herein with the same force and effect as if the whole of its claim was against Lefcourt, and on the further condition that, in case the said Committee shall not declare the agreement operative prior to April 15th, 1931, the undersigned reserves its right to file a notice of mechanic's lien affecting the premises known as 1619 Broadway, both against the 2619
interest of the owner thereof and of the lessees thereof for the balance then remaining unpaid on its said contract for the furnishing and installing of elevators, and on the further understanding that, if the Committee shall thereafter and before judgment shall be rendered in an action brought to foreclose said lien, declare the agreement op-

2620 erative, the undersigned will thereafter promptly cause said lien to be cancelled and discharged of record.

Claim
$135,948.58

Creditor
OTIS ELEVATOR CO
By W A BLACK
Assistant Treasurer

[CORPORATE SEAL]

2621 NOTE: Defendants' Exhibit R, Mr. Landsman's schedules of labor cost for painting and for papering, has been omitted from the printed record by stipulation, subject to either party's right to submit the same to the Court if so advised.

2622

Stipulation as to Record.

2623

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THE PRUDENCE COMPANY, INC.,
Plaintiff,

against

FIDELITY AND DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE,
Defendants.

2624

IT IS HEREBY STIPULATED AND AGREED, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated, December , 1934.

ALFRED T. DAVISON,
Attorney for Plaintiff.

THOMAS E. WHITE, 2625
Attorney for Defendants.

Clerk's Certificate.

2626

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THE PRUDENCE COMPANY, INC.,
Plaintiff,

against

FIDELITY AND DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE,
Defendants.

2627

I, CHARLES WIESER, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matters as agreed on by the parties.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed at the City of New York, in the Southern District of New York, this day of December, in the year of
2628 our Lord one thousand nine hundred and thirty-four and of the Independence of the said United States the one hundred and fifty-eighth.

CHARLES WIESER,
Clerk.

[fol. 877] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

THE PRUDENCE COMPANY, INC., Appellee,

against

FIDELITY & DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE, Appellants

Before Manton, Swan and Augustus N. Hand, Circuit Judges

Appeal from the United States District Court for the Southern District of New York. Action to recover damages on a surety bond. Judgment for plaintiff; defendants appeal. Reversed.

Thomas E. White, Esq., Attorney for Appellants. John W. Davis, Esq., Joseph F. Murray, Esq., Thomas E. White, Esq., of Counsel.

Alfred T. Davison, Esq., Attorney for Appellee. Alfred T. Davison, Esq., Martin A. Schenck, Esq., Orrin G. Judd, Esq., of Counsel.

MANTON, Circuit Judge:

The judgment appealed from was entered upon a directed verdict after a trial by a jury of one, pursuant to a stipulation of the parties. The action is upon a surety bond guaranteeing to appellee, holder of a first mortgage lien, the [fol. 878] completion of the apartment hotel, Essex House, in New York City. Central Park Properties, Inc., the mortgagor, was the principal on the bond given by the appellants.

Central Park Properties, Inc., had contracted for a building loan with the appellee, of $6,650,000.00, the building to be erected as provided by certain plans and specifications. Half the amount of the loan was advanced at the time of the closing of the loan, and the balance as the work progressed. Completion of the building was fixed for December 16, 1930.

Appellants' guarantee was for the completion of the building, not for the payment of the loan. On December 5, 1930, a certificate of occupancy having been granted theretofore, the appellee made the final payment under the building loan of $300,000, but by agreement retained

$75,000, which amount was then thought sufficient to complete the building. December 16, 1930, the principal of the mortgage was due, and the principal defaulted; all interest had been paid. December 18, 1930, appellee commenced foreclosure proceedings; January 19, 1931, judgment of foreclosure was entered. On the sale, March 17, 1931, appellee became the buyer for $6,000,000; August 30, 1931, a deficiency judgment was entered against the principal. Claiming that the building was not completed on December 16, 1930, the appellee has recovered a judgment based on the claim that it has suffered damages because of such incompletion.

The owner furnished a surety bond of three million dollars, wherein appellants guaranteed the construction and completion of the building by the principal in accordance [fol. 879] with the building loan agreement and the approved plans and specifications, by the 16th of December, 1930. They promised to make good any and all defaults of the principal. Appellee sued for breach, claiming a default in the obligation to complete the building, and, as damages, claimed (1) items necessarily spent to complete the building; (2) items of omission and substitution by the principal whereby the value of the building had been lessened; and (3) that by reason of the failure to complete the building it was deprived of interest on the principal of the loan from December 16, 1930 to October 1, 1931, together with taxes and insurance paid during part of that period.

Before final payment was made, December 5, 1930, the appellee's employees inspected the building thoroughly, and its own report showed that there was only $42,350 worth of work unfinished; a later report of December 16, 1930, fixed the amount at $23,500. When the final payment was made, the amount of work remaining to be done was disputed, but the principal and the appellee agreed upon the retention of $75,000 by the appellee for completion. The $75,000, however, was used by the appellee to reduce the mortgage principal, as was permissible under the terms of the agreement. It was not until February 14, 1931, that claims of incompletion were presented to appellants, by the appellee, in anything near the presently claimed sums. In April, 1931, the listed items of incompletion amounted to $254,177.29, and submitted items of omissions and substitutions amounting to $125,495.34.

[fol. 880] As a complete defense, the appellants argue that when, on December 5, 1930, the owner and the appellee agreed upon the final payment of the building loan, and the appellee retained $75,000, appellants were discharged. The building loan agreement provided that "the final advance shall not be due and payable until the borrower shall obtain and deliver to the lender the usual certificate of completion issued by the building Department * * *." A certificate of occupancy was issued October 3, 1930, but this was not a certificate of completion. Thus, the final advance was not due by reason of the issuance of the certificate of occupancy. The principal, however, made claims to the final payment when the certificate of occupancy was granted; the appellee refused, but made some further advances on several occasions, and later, did make the final payment as stated. The appellant's contention is that before this payment a controversy arose between the principal and the appellee as to completion, and the consequent right to final payment; that an agreement withholding some of the principal for completion having been reached, this settled the controversy, and so far as completion of the building is concerned, it took the place of the building loan agreement, and that thereafter any recourse which the appellee might have for failure to complete the building was against the principal pursuant to this compromise agreement, and that by virtue of such agreement, the appellants were discharged. The basis of this contention is that the agreement altered and changed the terms of the instruments by which the appellants were bound.

[fol. 881] But making an advance of payment did not, by the terms of the building loan agreement, constitute acceptance or approval of the work done. When the final payment was made, there was no release from the obligation to complete and no agreement was made upon any sum for completion. No compromise agreement took the place of the building loan agreement. The intent to substitute a new executory contract for an existing one must be clearly established. City Natl. Bank v. Fuller, 52 Fed. 2d, 870 (C. C. A. 8). The trial court found that the agreement of December 5, 1930 was in no way an accord and satisfaction. Upon disputed evidence, whether or not the transaction or agreement arived at was a compromise, novation,

or an accord and satisfaction, was a question of fact found against the appellants. Union Indemnity Co. v. United States, 74 Fed. 2d, 645 (C. C. A. 6).

Moreover, the surety bond provided:

"Any waiver or release by the Obligee * * * of any default or omission by the Principal and/or Surety in complying with said building loan agreement or plans and specifications or with the provisions of this bond, must be in writing and signed by the duly authorized officers of the Obligee in order to be binding upon the Obligee and any such waiver or release shall apply only to the item or items specifically so released."

Thus the appellants agreed that appellee would not be affected by releases or waivers unless in writing, and signed by duly authorized officers, specifying the items released. The appellee had a right to rely upon this provision. This defense therefore must fail.

[fol. 882] In the opinion below, the court held that the measure of damages which the appellee could recover is the cost of completion according to the plans and specifications. The appellee was entitled to a completed building for security only. The cost of completion may well be considered as the amount and the measure of damages sustained. In Kidd v. McCormick (83 N. Y. 391), there was an agreement to erect houses on certain lots on which the plaintiff held a bond and mortgage. Plaintiff later agreed to permit subsequent mortgages to have priority over his if the defendants deposited a certain sum of money in a trust company to insure the completion of the houses, which was done. The houses were not completed. The plaintiff completed them, foreclosed his mortgages, bid in the premises, and entered a deficiency judgment. Plaintiff sued to reach the moneys deposited in trust. The trial court found that the houses in their incompleted state were worth less than if finished as agreed, and a judgment was entered for the difference. Affirming on appeal, the court said that he was entitled to be put in as good plight as if the houses had been finished.

"His damages are the difference in the value of the premises, as they were with the houses unfinished, * * *, from what the value of them would have been, had the houses been finished * * * according to the contract."

After saying that this was the measure of the damages, the court pointed out that there were several methods of arriving at the amount. Testimony of three kinds might be received:

(1) experts as to the difference in value;
(2) experts as to the cost of completion; and
(2) actual cost of completion.

[fol. 883] The end to be arrived at, however, was said to be the difference in value between the building furnished and the house as it should have been furnished. If the actual cost of completion does not, in fact, represent the difference in value, it is not to be considered as determinative. In Trainor Co. v. Aetna Casualty & Surety Co. (290 U. S. 47), the mortgagee sued on a bond guaranteeing completion of a building by the mortgagor. The mortgagor failed to complete fully 28 of 52 buildings which he had agreed to erect and complete. The property was located in Pennsylvania, and the court pointed out adherence to the Pennsylvania rule of law as essential, but said:

"Petitioner is entitled to be put in as good position in respect of its debt as it would have occupied if the buildings had been completed in accordance with the terms of the undertaking; and this can be done here only by giving it the amount of the difference between the value of the unfinished buildings and their value as it would have been if completed in accordance with the agreement—see Kidd v. McCormick, supra, p. 398—but exceeding neither the amount due on its debt nor the amount of the bond."

The true measure of damages to this appellee, is the extent to which its security was impaired by the failure to complete in accordance with the plans and specifications. The actual cost of completion may, as observed in Comey v. [fol. 884] United Surety Co. (217 N. Y. 268), make damages more certain, or may be used as proof of actual damages.

Recovery has been allowed in Pennsylvania (Mechanics Trust Co. v. Fidelity & Casualty Co., 304 Pa. 526) on a surety guaranteeing completion of houses by the mortgagor, the court saying:

"The bond upon which defendant was surety imposed an absolute undertaking * * * to complete the dwellings

* * * which, when the principal defaulted, defendant was bound to perform. This construction is supported by numerous authorities. * * * The measure of damages on a bond given to a mortgagee—obligee guaranteeing completion is the cost of completion * * *, and is not limited to the difference between the value of the property in the condition in which it was left and the amount of principal and interest due on the mortgage."

See: Bd. of Education v. Maryland Casualty Co., 27 Fed. 2d, 20 (C. C. A. 3); Purdy v. Massey, 306 Pa. 288; Equitable Trust Co. v. Surety Co., 214 Pa. 159. We understand this to mean that the actual loss, namely, the extent to which the security was impaired, is usually indicated by the cost of completion of the building. This cost may be rebutted by showing excessive or unnecessary expenditures by expert testimony and therefore that the cost is not the damages.

In Norway Plains Savings Bank v. Moors (134 Mass. 129), the defendant covenanted with a mortgagee—bank that certain houses would be erected, as agreed, by the mortgagor. There was a default by the mortgagor. The court held that the measure of the bank's damages was

[fol. 885] "so much of the difference in value between the houses as they were in fact built, and the value they would have had if the foundations had been properly constructed, as added to the value of the houses as in fact built was sufficient to pay the principal of the mortgage debt and the interest due thereon."

We think, therefore, that the measure of damages was the difference between the value of the building on December 16, 1930, as the work had progressed, and the value it would have had on that day if completed strictly in accordance with the plans and specifications.

Appellee claimed, not only for items of incompletion, but also for omissions and substitutions. It is true that these latter items might detract from the value of the building on that date. The contention was advanced below that those changes were made by consent of appellee.

Evidence was offered tending to show that the president of the appellee consented to the substitutions made, and it was excluded. The appellants claimed a parole waiver

of the requirement of the bond that no waiver or release of default or omission was to be valid unless in writing signed by an officer and referring specifically to the item or items waived or released. Such a parole waiver or consent would be legally effective. Northern Assurance Co. v. Grandbein, 183 U. S. 352; Beatty v. Guggenheim Exploration Co., 225 N. Y. 380. If the appellee's president had authority to waive the requirement of a written waiver or consent, excluding such evidence was prejudicial error. Waiver of the condition of the bond and consent to changes [fol. 886] as substitutions or omissions would release the appellant from such items as claims of damages. But since the bond required completion in accordance with the plans and specifications, any omissions or inferior substitutions not consented to by appellee, may be considered as items of damage.

In addition to the bond furnished by the appellants, the building loan agreement required the personal guarantee of the president of the Central Park Properties, Inc., in the amount of One million Dollars. The fifth paragraph of the building loan agreement provided:

"The payment of principal and interest on said bond and mortgage, as and when the same shall become due, and all other payments required to be made hereunder, and the performance by the Borrower of all covenants and agreements herein contained, shall be guaranteed jointly and severally by Abraham E. Lefcourt."

Lefcourt not only guaranteed the completion of the building, but also the payment of principal and interest on the bond and mortgage, and agreed to make good any default of the borrower on its building loan agreement, [fol. 887] and bond or mortgage. The guarantee of the principal and interest read:

"together with payment of principal and interest on the bond and mortgage."

The appellee has recovered interest on the mortgage, and the taxes on the property, and insurance. None of these were within the undertaking of the appellants. The condition of the bond given by the appellants was that if the principal should proceed with the construction of the building so that it was completed in accordance with the building loan agreement and the plans and specifications,

and ready for occupancy not later than December 16, 1930, free and clear of liens; and if the principal paid for the cost of construction and completion, and "if the surety shall indemnify the obligee from loss or damage caused by the failure to construct, pay for and complete the building", and if the surety shall make good any default "in constructing, paying for and completion the building," then performance of the obligation of the bond was satisfied. There is no condition, express or implied, respecting payment of the principal or the interest of the loan, taxes or insurance, and no liability exists therefor. Province Securities Corp. v. Maryland Casualty Co., 269 Mass. 75; United Real Estate Co. v. McDonald, 140 Mo. 605; Smith v. Molleson, 148 N. Y. 23. In the absence of express contract to pay the interest, interest as damages cannot be recovered apart from the principal of the debt. Holden v. Trust Co., 100 U. S. 72; Brewster v. Wakefield, 22 How. 118; Hamilton v. Van Rensselaer, 43 N. Y. 244; O'Brien v. Young, 95 N. Y. 428.

Moreover, under the rule of measure of damages to which we have made reference, and which is here appli- [fol. 888] cable, the interest, taxes or insurance may not be recovered. Kidd v. McCormick, supra; Trainor Co. v. Ætna Casualty Co., supra.

Upon a new trial, which must be had, in establishing appellee's damages, the rule of cost of completion will be the guide. Evidence of experts as to the difference in value showing cost of completion, evidence of actual cost, and experts' testimony as to cost of completion, may be received.

Loss due to items of inferior substitution unless effectively consented to by the appellee may also be recovered.

Since the complaint does not plead and no proof has been received showing loss of rent during the period of incompletion, we need not decide whether or not this appellee might have had a loss of profits because of failure to have a completed building after its entry and possession of the premises. See: Provincetown Securities Corp. v. Maryland Casualty Co., 168 N. E. (Mass.) 257.

Judgment reversed and new trial ordered.

[fol. 888½] Endorsed: United States Circuit Court of Appeals, Second Circuit. The Prudence Company, Inc., v. Fidelity & Deposit Co., etc. (Copy.) Opinion. Manton, Circuit Judge.

[fol. 889] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 17th day of June, one thousand nine hundred and thirty-five.

Present: Hon. Martin T. Manton, Hon. Thomas W. Swan, Hon. Augustus N. Hand, Circuit Judges.

THE PRUDENCE COMPANY, INC., Plaintiff-Appellee,

vs.

FIDELITY & DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE, Defendants-Appellants

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed with costs and cause remanded for a new trial. Further ordered that execution issue for the collection of said costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 890] Endorsed: United States Circuit Court of Appeals, Second Circuit. The Prudence Company, Inc., vs. Fidelity & Deposit Company of Maryland et al. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed June 17, 1935. William Parkin, Clerk.

[fol. 891] UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify

that the foregoing pages, numbered from 1 to 890, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of The Prudence Company, Inc., Plaintiff-Appellee, against Fidelity & Deposit Company of Maryland and American Bonding Company of Baltimore, Defendants-Appellants, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 18th day of July, in the year of our Lord one thousand nine hundred and thirty-five, and of the Independence of the said United States the one hundred and sixtieth.

Wm. Parkin, Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.)

[fol. 892] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 14, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, limited to the question of the measure of damages.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

JUL 22

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 270

THE PRUDENCE COMPANY, INC.,

Petitioner,

vs.

FIDELITY & DEPOSIT COMPANY OF MARYLAND AND AMERICAN BONDING COMPANY OF BALTIMORE.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

ALFRED T. DAVISON,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 270

THE PRUDENCE COMPANY, INC.,

Petitioner,

vs.

FIDELITY & DEPOSIT COMPANY OF MARYLAND AND AMERICAN BONDING COMPANY OF BALTIMORE.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Supreme Court of the United States:

The Prudence Company, Inc., petitioner, by Alfred T. Davison attorney and counsel, prays that a Writ of Certiorari issue to review the decree (R. 885) of the United States Circuit Court of Appeals for the Second Circuit, made in the above entitled case on June 17, 1935, which decree reverses the judgment (R. 61) of the United States District Court for the Southern District of New York, entered June 14, 1934, in favor of petitioner, as plaintiff, against Fidelity & Deposit Company of Maryland and American Bonding Company of Baltimore, as defendants, for $781,694.56, and which decree also orders a new trial.

Opinions Below.

The opinion of the District Court (R. p. 498) is reported in 7 F. Supp. 392.

The opinion of the Circuit Court of Appeals is not yet reported, but is printed in the record (R. 877).

Jurisdiction.

The decision of the Circuit Court of Appeals was rendered June 10, 1935, and the order for the mandate* thereon was entered June 17, 1935.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by Act of Congress of February 13, 1925 (U. S. Code, Title 28 Sec. 347).

The fact that the case was remanded for a new trial does not prevent the issuance of a Writ of Certiorari at this time rather than awaiting the outcome of a new trial, which new trial the application for this writ seeks to make unnecessary.

United States v. *Gulf Refining Company*, 268 U. S. 542, 545;

Stringfellow v. *Atlantic Coast Line R. Co.*, 290 U. S. 322.

Questions Presented.

1. Whether the measure of damages sustained by a mortgagee, as obligee under a surety bond, which (1) guarantees the completion on a certain date of the building to be mortgaged as security for the building loan, and (2) agrees to fully indemnify the obligee, in case of breach of such bond, includes interest lost (on the amount advanced under the

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* The issuance of the mandate of the Circuit Court of Appeals has been stayed by that Court pending the consideration and decision of this petition for writ of certiorari.

building loan agreement) between the date on which the building (under the guaranty and indemnity bond) should have been completed and the date on which it was actually completed.

2. Whether such measure of damages under the guaranty and indemnity bond above mentioned includes, in case of such breach, taxes and insurance premiums which the mortgagee (obligee under the bond) was required to, and did, pay during its completion of the building.

3. Whether the Circuit Court of Appeals has correctly interpreted the decision of this Court in *Trainor* v. *Aetna Casualty Co.*, 290 U. S. 47, and the decision of the New York Court of Appeals in *Kidd* v. *McCormick*, 83 N. Y. 391, with respect to the measure of damages of a mortgagee, as obligee under the guaranty and indemnity bond above mentioned.

4. Whether the following provision, contained in such guaranty and indemnity bond (given by the defendants below as sureties to the obligee)

> "Any waiver or release by the Obligee of any default or omission by the Principal and/or Surety in complying with said building loan agreement or plans and specifications or with the provisions of this bond, must be in writing and signed by the duly authorized officers of the Obligee in order to be binding upon the Obligee, and any such waiver or release shall apply only to the item or items specifically so released."

is or may be waived by conversation between an officer of the obligee and a person who does not represent either the principal or the surety companies.

5. If the foregoing provision quoted in "4" above can be orally waived, then whether a conversation between the

former architect of the principal (but at that time representing neither the sureties nor the principal) and an officer of the obligee, with respect to unspecified variations which had been made from the plans and specifications embodied in the building and loan agreement, is evidence tending to show that such obligee

(1) had consented to variations included in the damages sought in this action;

(2) had effectually waived the provision of the bond quoted in "4" above; and

(3) can deprive the obligee of its rights to indemnity for variations not consented to, waived or released in accordance with the provision of the surety bond quoted in "4" above.

The above questions and points were raised and argued by all parties and considered by the Circuit Court of Appeals.

Statement of Facts.

This is an action at law by petitioner (plaintiff in the District Court, and hereinafter referred to as "Prudence Company"), as obligee, under a guaranty and indemnity bond for $3,000,000 given by defendants (Fidelity & Deposit Company of Maryland and American Bonding Company of Baltimore, and hereinafter referred to as "sureties"), in order to induce Prudence Company to advance as a building loan $6,650,000 to Central Park Properties, Inc. (hereinafter referred to as "principal") for the construction of, and to be secured by, mortgage on an apartment hotel (the largest apartment hotel in New York, now known as "Essex House").

Said surety bond:

1. Guaranteed the construction and completion *not later than December 16, 1930* of *the* (not *a*) modern 40-story and basement fire-proof hotel, specifically described and identified (R. p. 595) in "*strict* accordance" with the building loan agreement and with the plans and specifications, therein referred to and definitely identified by the parties, so as to be (not later than said December 16, 1930) *ready for occupancy as a modern hotel* (furniture only excluded).

2. Obligated the surety companies to "*fully indemnify*" Prudence Company "against any and all loss or damage by reason of failure of the Principal to * * * complete said building * * * within the time aforesaid" and in accordance with the plans and specifications (R. p. 596), and also "to make good any and every default on the part of the principal" in performing any of the terms, covenants and conditions which the principal had agreed to keep and perform in the building loan agreement up to and including the completion of and payment for said building (R. p. 596).

3. Provided that *any waiver or release* by Prudence Company of any default or omission by principal and/or surety in complying with the building loan agreement or plans and specifications *must, in order to be binding upon Prudence Company, be* (1) *in writing, and* (2) *signed by duly authorized officers of Prudence Company,* and (3) *specify* "the item or items so specifically released" (R. p. 604).

4. Provided that upon default by principal and/or sureties, Prudence Company may

(1) complete in general accordance with building loan agreement and plans and specifications (R. p. 602); and

(2) "do all other acts and things deemed necessary or proper by the obligee" (Prudence Company) "to complete and equip said building" (R. p. 602).

The bond then goes on to provide (R., p. 602) that the sureties shall repay Prudence Company "any and all sums of money paid by the obligee" (Prudence Company) "for the purposes" just enumerated "with interest."

The full amount of the building loan was advanced in accordance with the building loan agreement, and $75,000 on account thereof was paid, leaving as the total amount of the mortgage loan advanced $6,575,000.

Defaults under the bond are conceded.

Concededly,

(1) the building was not completed and ready for occupancy on December 16, 1930;

(2) the building was not constructed in accordance with the plans and specifications and the building loan agreement; and

(3) large amounts of money remained to be expended to bring the building up to the mark of the contract.

The word "concededly" is used advisedly.

We need refer only to the verified answers (R., pp. 39, 50, 51), marked in evidence at the trial (R., pp. 249-50) and to the statements of defendants' counsel upon the trial (R., p. 334).

The District Court's findings of fact with respect to such defaults were not questioned by the Circuit Court of Appeals.

The Prudence Company completed the building after notices to the surety companies, giving opportunity to them to complete, and after their failure to do so.

During the course of such completion, Prudence Company expended large sums of money for labor and materials and also for taxes and insurance premiums on this building.

There were also substantial departures from the plans and specifications, which The Prudence Company, in accordance with its rights under the bond (R., pp. 602-03) did not go to the expense of remedying—omissions of items called for, and substitutions of materials inferior to those called for by the plans and specifications.

Authority to pass on requests for permission to change specific items in the plans and specifications was vested in a Committee of plaintiff's staff, of which committee the Vice-President in charge of this loan, Mr. Braislin, was a member (R., p. 117). The principal knew of this Committee (R., pp. 136-7), and it was referred to in correspondence concerning various requested changes (Plaintiff's Exhibits 12 and 13, R., pp. 684-5).

Certain requested changes in the plans and specifications had been permitted, and in each case approved in writing. No claim is made for damages on account of such permitted changes. Other omissions of items called for by the plans and specifications and substitutions of inferior materials took place, however, without the permission or knowledge of the plaintiff, as is established by the evidence and by the verdict directed by the Trial Court.

There was no evidence offered to show that any officer other than the Committee, even the President, had authority to waive or consent to changes; yet one of the grounds of reversal relied on by the Circuit Court of Appeals was the sustaining of plaintiff's objection to a question put to Mr. Grad, the former architect of the principal, with reference to a conversation had with the President of plaintiff, in connection with another loan, as follows:

> "Q. And didn't you tell him" (meaning the President of the plaintiff) "at that time about certain things which in your opinion were not in accordance with the plans and specifications"?

The case was tried, pursuant to written stipulation (R., p. 65), before a jury of one, and both parties agreed that they should be deemed, at the conclusion of the trial, to have moved for a directed verdict without reservation of any right to have any issue or issues submitted to the jury.

Pursuant to such stipulation, the Court, after trial consuming 7 court days, directed a verdict in favor of plaintiff for $777,934.54 (R., p. 516) which, with interest from the date of the verdict to the date of the entry of the judgment, made up the amount of the judgment entered June 14, 1934, namely, $781,694.56 (R., p. 61).

Such judgment includes three types of damages to the plaintiff (R., pp. 515-16, 63), viz.:

I.	Amount expended by plaintiff in the completion of the building (including insurance premiums in the sum of $1,640.87 and taxes in the sum of $57,120)	$209,454.85	
	Interest thereon to May 15, 1934	33,765.93	$243,220.78
II.	Amount representing estimated cost of supplying omissions of materials called for by plans and specifications and difference in value of inferior materials substituted for items called for by plans and specifications	$143,842.28	
	Interest thereon from December 16, 1930, to May 15, 1934	29,426.76	173,269.04

III. Amount of interest lost by plaintiff by reason of failure to complete on or before December 16, 1930, being interest on $6,575,000—net amount advanced on building loan mortgage—from December 16, 1930, to date of completion, October 1, 1931 (as alleged in subdivision XXXVII (3) of the complaint)	$312,357.53	
Interest thereon from October 1, 1931, to May 15, 1934	49,087.19	361,444.72
Total amount of verdict		$777,934.54
Interest thereon from May 15, 1934 (date of direction of verdict) to June 14, 1934 (date of entry of judgment on the verdict)		3,760.02
Total amount of judgment		$781,694.56

All defenses set up by the defendants were either stricken out by the District Court on motions before trial (See opinion of Judge Bondy, R., p. 523—2 F. Supp. 454—) or were held not proved at the trial (See opinion of Trial Court—Judge Galston—R., p. 498), and the Circuit Court of Appeals was in accord with such dispositions thereof, except only with respect to one aspect of the partial defense of waiver, which is one of the questions presented on this application.

The decision of the Circuit Court of Appeals, reversing the judgment and ordering a new trial, is upon the following grounds:

1. That the measure of damages on the breach of this bond of guaranty of completion and also of indemnity does not permit the recovery of interest which the Prudence

Company lost on the money it had actually advanced on the mortgage loan on the building (which was not completed) between the date the building should have been completed (December 16, 1930) and the date of actual completion by the Prudence Company (October 1, 1931).

2. That the measure of damages on the breach of this bond of guaranty of completion and indemnity does not permit the recovery of taxes ($57,120) and insurance premiums ($1,640.87), which Prudence Company was required to pay for the period between the date the building should have been completed and the date it was completed.

3. The exclusion of evidence, "tending to show" parole waiver or release of requirements of building loan agreement and plans and specifications, was prejudicial error.

Specifications of Error to Be Urged.

The Circuit Court of Appeals erred:

I.

With respect to the items of interest, taxes and insurance.

1. In holding that none of the items of interest, taxes and insurance, for the period between the date fixed for completion of the building and the date of actual completion, was recoverable under the applicable rule of measure of damages.

2. In holding that interest lost on the loan and taxes and insurance paid, for the period between the date fixed for completion of the building and the date of actual completion, were not within the contemplation of the parties at the time of the execution and delivery of the surety bond.

3. In holding that there is no evidence to support the finding of fact by the Trial Court that interest, taxes and

insurance were each within the contemplation of the parties.

4. In holding that, in the absence of express contract to pay the interest lost on the mortgage loan, interest as damages, even though within the contemplation of the parties, cannot be recovered under the surety bond and that there was no evidence to support the District Court's finding on this point.

5. In holding that there is no condition, express or implied, in the surety bond, respecting payment of interest on the loan, taxes or insurance, and that no liability exists therefor, and that none of them are within the undertaking of the surety companies.

6. In holding that, under the decision of the Court of Appeals of the State of New York in *Kidd* v. *McCormick*, 83 N. Y. 391, and the decision of this Court in *Trainor* v. *Aetna Casualty Co.*, 290 U. S. 47, interest, taxes and insurance are not recoverable as damages on the breach of the surety bond.

7. In holding that the true measure of damages to the Prudence Company is the extent to which its security was impaired by the failure to complete the building in accordance with the plans and specifications.

8. In holding that any Court can pass upon the margin or nature of security to which the Prudence Company is entitled under the building loan agreement and surety bond in this case.

9. In holding that the Prudence Company was not entitled on December 16, 1930, to a completed building, which could be immediately rented and availed of as a source of income, out of which to pay interest, taxes and insurance.

10. In holding that the Prudence Company cannot recover interest as damages by reason of the failure to complete said building on December 16, 1930, in the absence of proof showing loss of rent during the period of incompletion.

11. In holding that the parties did not contemplate at the time of the building loan agreement that the building would rent and was capable of being rented for more than enough to pay interest, taxes and carrying charges.

12. In holding that interest, taxes and insurance should not be included as damages under a rule of measure of damages based upon the difference of the value of the building on December 16, 1930, as the work had progressed, and the value it would have had on that day, if completed strictly in accordance with the plans and specifications.

II.

With respect to the alleged evidence of waiver.

13. In holding that any evidence was offered which in any way tended to show that the Prudence Company or President of the Prudence Company consented to any substitutions by the principal of materials inferior to those called for by the plans and specifications.

14. In holding that there could be any parole waiver of the requirement of the bond that no waiver or release of default or omission was to be valid, unless in writing signed by duly authorized officers and restricted to the item or items specifically waived or released.

15. In holding that the requirement of the surety bond last above mentioned could be waived by oral statements between any officer of the Prudence Company and a person who, at the time of such oral statements, was not an officer

of and did not represent any of the parties to the surety bond.

16. In holding that the President of the Prudence Company had or purported to have any authority to waive the provisions of the building loan agreement and plans and specifications or the requirement of the bond with respect to written waiver.

17. In holding that the exclusion of the evidence relied upon by the Circuit Court of Appeals was error prejudicial to the surety companies.

18. In holding that substitutions or changes could be effectively consented to, waived or released by Prudence Company without a writing signed by duly authorized officers and specifying the items so released.

III.

With respect to the ordering of a new trial.

19. In ordering a new trial of the case, rather than (assuming for the purpose of argument that there was any error with respect to the measure of damages) modifying, and affirming as modified, the judgment of the District Court.

Reasons for Granting the Writ.

1. The Circuit Court of Appeals has rendered a decision in conflict with the decision of this Court in *Trainor* v. *Aetna Casualty Co.*, 290 U. S. 47.

Clearly, as we submit, this Court has ruled that interest, taxes and insurance are within the damages contemplated by parties to such a surety bond as is the subject of this action.

Whereas in *Trainor* v. *Aetna Casualty Co., supra,* this Court held, with respect to the measure of damages of a

plaintiff mortgagee on the breach of a bond guaranteeing completion of certain buildings and improvements,* as follows:

> "* * * In the meantime, the uncompleted buildings necessarily lay unrented, subject to expense in the way of *taxes, insurance, accumulating interest, etc.*, deteriorating in quality and steadily declining in value. *Petitioner is entitled to be put in as good position in respect of its debt as it would have occupied if the buildings had been completed in accordance with the terms of the undertaking;* * * *." (Italics ours.)

nevertheless the Circuit Court of Appeals has disregarded the plain implication of that decision and thereby created confusion in the law.

Aside from the contemplation of the parties (and as argued in more detail in the brief in support hereof), the difference in value between the building as it was on December 16, 1930 and as it should have been under the building loan agreement and plans and specifications necessarily involves what a willing buyer would pay and a willing seller would take; certainly a willing buyer would necessarily be required to deduct from any amount which he otherwise would pay for this property on December 16, 1930, interest (pending completion of the building) on the purchase price, plus the cost of completion and also taxes and insurance during completion.

2. The Circuit Court of Appeals has decided an important question of law affecting a contract made and to be performed in the State of New York in a way in conflict with the applicable decision of the Court of Appeals of the State of New York.

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*The bond in the instant case both guarantees completion and also provides for full indemnity to the Prudence Company.

In *Kidd* v. *McCormick*, 83 N. Y. 391 (which case this Court cited with approval in *Trainor* v. *Aetna*), the New York Court of Appeals establishes not only that interest is recoverable as an item of damage, but also that it is clearly within the contemplation in such situations as here presented. In that case, plaintiff conveyed the property to the defendants, taking back purchase money mortgages which he subordinated to first mortgages. In order to induce the plaintiff to so subordinate, it was agreed that a special fund should be provided to be paid to the plaintiff when the buildings were completed and ready for occupancy. Defendants defaulted in completing and the question was raised concerning the rights of the plaintiff as said second mortgagee in such special fund so deposited for the completion of the buildings.

In affirming judgment in favor of the plaintiff (second mortgagee), the New York Court of Appeals said (p. 395):

> "* * * Clearly he" (plaintiff, second mortgagee) "is entitled to have from the McCormicks as much as will put him in as good plight as he would have been had the houses been finished."

and at page 398:

> "The plaintiff was entitled on the 1st of September, 1877, that there should be finished houses, rentable, and so, *productive of income with which to keep down interest on the mortgages on the lots, the taxes thereon, and insurance premiums.* He could not, on that day, had he been let into immediate possession and control, by any expenditure of money or energy, have completed them at once; nor, in the nature of things, could he have supplied the lack of the completed houses by a purchase in the market. *The work needed to complete was one of time; and while the time was running, interest was running also, taxes were levied, insurance was to be kept up, and the premises were yielding no rent.*

> *It is plain that to repay him just what he expended to finish the buildings would not make him whole; for he had to pay, besides the cost of building, interest to Granniss,"* (first mortgagee) *"and lose interest on his own mortgages, and pay taxes and premiums."*

In *Kidd* v. *McCormick* there was no bond with the many and specific obligations which are in the bond in this case. We have, however, called attention to what the Court said in that case because it indicates what subsequent to that case must have been plain to sureties binding that same relationship.

While the Circuit Court of Appeals professed to follow the decision of the New York Court of Appeals in *Kidd* v. *McCormick, supra,* it has, nevertheless, held that interest, taxes and insurance cannot be recovered in a case such as this.

3. Ever since *Hadley* v. *Baxendale,* 9 Exch. 341, 354, 356 (1854) the law has been well settled and unquestioned that damages on breach of contract

> "should be * * * such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."

(See *Howard* v. *Stillwell & Bierce Mfg Co.,* 139 U. S. 199, 207, approving *Hadley* v. *Baxendale, supra.)*

The decision of the Circuit Court of Appeals in this case is in conflict with the rule or measure of damages as laid down in *Hadley* v. *Baxendale* and subsequent cases.

4. The Circuit Court of Appeals is a Court of last resort in a great majority of the cases coming before it. If, as we submit, the Circuit Court of Appeals has misapplied the law as laid down by this Court in *Trainor* v. *Aetna Casualty*

Co., and by the New York Court of Appeals in *Kidd* v. *McCormick*, such decision should not be permitted to stand. The substantive law with respect to surety and assured will be made more definite and consistent by this Court passing upon the questions here presented.

5. Both parties in this case asked the Court to direct a verdict and, therefore, the Circuit Court of Appeals, in reviewing the action of the Trial Court, was limited to the consideration of the correctness of the finding of law and was required to affirm, if there was any evidence in support thereof.

Beutell v. *Magone*, 157 U. S. 154;
Lehnen v. *Dickson*, 148 U. S. 71;
Runkle v. *Burnham*, 153 U. S. 216.

In order to reverse on the ground that interest, taxes and insurance were improperly included in the judgment, the Circuit Court of Appeals, in effect, held that there was no evidence supporting the finding of fact by the Trial Court that these items were within the contemplation of the parties.

Such a holding is palpable error, calling for the supervisory jurisdiction of this Court.

6. This case involves an important question of law of general importance, concerning which the decision of the Circuit Court of Appeals is both uncertain and unsatisfactory.

It is respectfully submitted that all question of uniformity of decision, with respect to the recovery of interest, taxes and insurance on a bond such as this, should be definitely settled. A correct and definite determination of the liabilities on such bonds is of importance to builders and lenders throughout the country, not only on bonds now in force, but also on all which may be written.

Especially is the question involved in this case of importance and in the public interest, because the Prudence Company, an investment corporation under the Banking Law of the State of New York, made and holds its investments for the benefit and protection of a large number of investors, whose interests are vitally affected by reason of the loss of interest, taxes and insurance in this case.

The Prudence Company agreed to make this loan on the condition of this $3,000,000 bond being executed and delivered. The various committees of creditors and stockholders of the Produence Company, now in re-organization under Section 77-B of the Bankruptcy Law, as well as the Reconstruction Finance Corporation, which has loaned $20,000,000 to the Prudence Company, are vitally interested in this case and the correct decision of the questions of law in connection therewith.

7. The obligees under surety bonds throughout the entire United States are vitally interested in the question of whether any protection to the obligee is afforded by a provision in a surety bond, whereby no claim can be made that the obligee has consented to variations, substitutions, changes or omissions by the principal, unless duly authorized officers of the obligee specifically consent thereto in writing.

In order to protect themselves against a claim of oral waiver of provisions of the building loan agreement and plans and specifications, the directors and officers of the Prudence Company (which had agreed to make building loans on 120 separate buildings then being erected) required the insertion in the surety bond in this case of the above mentioned provision.

By the decision of the Circuit Court of Appeals in this case, the action of the directors and the committee which

passes upon loans is to be rendered nugatory by oral evidence of casual conversations with an officer of the plaintiff who was not a member of the committee constituted for the purpose of passing upon requested variations from the plans and specifications.

8. The question of oral evidence of waiver or consent to substitutions or omissions is left indefinite and uncertain in this case.

Under the decision of the Circuit Court of Appeals, if the trier of fact finds that any officer of the Prudence Company had authority to waive and obtained information from any source as to violations of the plans and specifications, the trier of fact may base a finding thereon that the Prudence Company itself has waived or consented to such violation, notwithstanding the protection which the directors of Prudence Company thought they had bargained for with the surety companies by having inserted in the bond the provision restricting waivers in the language above quoted, and notwithstanding the reliance of such directors on such provision in the bond guaranteeing the construction and completion of this forty-story building in all its details.

Certainly, the holding of the Circuit Court of Appeals which permits the elimination of this provision from the bond and thus permits upon oral evidence variations in the details of construction is of such importance in the law of contracts as to require an authoritative decision by this Court. Especially is this so when the oral evidence in this case, seeking to modify *the surety bond,* was by a person not connected with either sureties or with the principal.

9. The trial of this case consumed seven actual court days, in addition to the time required for preparation, briefs and consideration by the Court itself.

Due to the amount of the bond ($3,000,000) and the peculiar gravity of the case, if there is to be a new trial, such new trial should not be had until this Court has definitely passed, first, upon the necessity therefor, secondly, upon the items of damages applicable upon such new trial, if it be necessary.

WHEREFORE, your petitioner respectfully requests that a Writ of Certiorari should be granted, as prayed for.

Dated, July 22, 1935.

THE PRUDENCE COMPANY, INC.,
By ALFRED T. DAVISON,
Attorney and Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Reference to the opinions of the Court below, and the grounds of jurisdiction, as well as a statement of the case, and specifications of error to be urged, are contained in the Petition.

Summary of Argument.

I.

The Applicable Decisions of the Supreme Court and the New York Court of Appeals Justify and Require the Allowance of Interest, Taxes and Insurance as Part of the Damages Caused by the Failure to Complete the Building at the Time Guaranteed.

The items of interest, taxes and insurance inevitably and properly enter into the determination of difference in values between the building contracted for and the building at the time when it should have been completed.

II.

The Provisions of the Surety Bond in This Case Specifically Obligated the Surety to Pay Interest on the Loan, and Taxes and Insurance on the Mortgaged Property, Until the Date of Actual Completion of the Building in Accordance With the Plans and Specifications.

III.

Aside from the Express Provisions of the Bond Requiring Payment of Interest, Taxes and Insurance, Their Recovery as Damages Involves a Question of Fact as to What Was Contemplated by the Parties: and This Fact, Supported by Evidence and Found by the District Court, Was Not Open to Review by the Circuit Court of Appeals.

The question of what damages were contemplated by the parties at the time the contract was made is a question of fact.

IV.

Even Assuming, for the Purpose of Argument, That the Contract in This Case (the Surety Bond) Could be Orally Changed by the Parties Thereto, Nevertheless the Circuit Court of Appeals Has Confused the Contract Which It Says Was Changed.

There Is No Pretense in the Record That the Parties to the Surety Bond Ever Undertook or Attempted to Change the Provisions of the Surety Bond.

V.

The Evidence, the Exclusion of Which Was Made a Basis of Reversal by the Circuit Court of Appeals, Did Not "Tend to Show" Any Waiver of the Plans and Specifications or Consent to Substitutions.

Moreover, there was not even any evidence offered in this case that the President purported to waive anything.

Conclusion.

ARGUMENT.

I.

The Applicable Decisions of the Supreme Court and the New York Court of Appeals Justify and Require the Allowance of Interest, Taxes and Insurance as Part of the Damages Caused by the Failure to Complete the Building at the Time Guaranteed.

The controlling decisions, cited by the District Court in support of its decision (R. pp. 506-07), discussed in the briefs of both parties before the Circuit Court of Appeals, and in turn relied upon by the Circuit Court of Appeals

without explanation, as a basis for its reversal of the District Court's decision, are *Trainor* v. *Aetna Casualty Company*, (290 U. S. 47-1933) decided by this Court and *Kidd* v. *McCormick* (83 N. Y. 391-1881), decided by the New York Court of Appeals, both of which have already been referred to in the petition (*supra*, pages 13-17).

The Circuit Court of Appeals failed to cite or consider the pertinent portions of those cases.

Kidd v. *McCormick* clearly recognizes that part of the damages which a mortgagee suffers by reason of failure to complete a building on the date called for, are the loss of interest during the period of completion, and the taxes and insurance premiums which must be paid pending completion—during the period that is, while, because of the principal's default, it is impossible to produce any income to keep down such carrying charges. No court has ever questioned the language or the justice of the statement of Chief Judge Folger in that case (83 N. Y. 398):

> "It is plain that to repay him just what he expended to finish the buildings would not make him whole.".

See also the portion quoted in the petition *supra* at pages 15-16. Equally plainly, such reference to interest, taxes and insurance premiums as part of the mortgagee's damages in that case, was not mere dictum. In fact, in *Kidd* v. *McCormick* the items of damage by reason of loss of interest and accruing taxes and insurance were included as one of the very grounds urged in support of the judgment in the plaintiff's brief to the Court of Appeals (p. 6 of brief).

When this Court in *Trainor Company* v. *Aetna Casualty Company* approved *Kidd* v. *McCormick*, and referred in similar language to the fact that pending completion "the uncompleted buildings necessarily lay unrented, subject to expense in the way of taxes, insurance, accumulating interest, etc." (290 U. S. at 55), it certainly approved the inclusion of such items in the measure of damage, and this Court

recognized that "to repay him just what he expended to finish the buildings would not make him whole."

The Circuit Court of Appeals, by disregarding, without discussion, such specific language, has not only misconstrued a decision of this Court, and denied relief on a New York contract to which plaintiff was entitled under the law of New York, but has necessarily created confusion and uncertainty as to the true rule of damages, which calls for the supervisory action of this Court.

> The items of interest, taxes and insurance inevitably and properly enter into the determination of difference in values between the building contracted for and the building at the time *when it should have been completed.*

There is no inconsistency between the rule that the measure of damages is the difference in value and the claim to include lost interest and taxes and insurance premiums as part of the damages under a bond guaranteeing completion at a certain date and indemnifying against loss by reason of non-completion. On the contrary, the two ideas are perfectly consistent. As the Court of Appeals stated in *Kidd* v. *McCormick,* the mere out-of-pocket expense of completion did not make allowance for the loss of interest, taxes and insurance during the period of completion and would not make the obligee (mortgagee) whole. There is no conceivable way of valuing an incompleted building without considering the fact that in order to complete it, time will be necessary and that during that time, interest on the investment will be lost or must be paid and taxes and insurance must also be paid.

In order to understand how clearly the New York Court of Appeals has expressed itself on this question, and how accurately the plaintiff followed its rules, it is necessary to quote again *Kidd* v. *McCormick* (83 N. Y. at 397):

> *"Stated in its broadest form, the plaintiff is to have that compensation, which will leave him as well off as*

he would have been had the contract been fully performed. With more particularity, he has a right to a house as good as that which the defendants agreed to furnish; and his damages is the difference between the value of the house furnished and the house as it ought to have been furnished. One kind of testimony by which that difference may be made known, is that of experts, saying what would have been the value of the one, and what is the value of the other. Another kind of testimony is that of experts, what it would cost to complete the unfinished house up to the mark of the contract. Another kind is, when the house has been in fact finished, up to that mark, what it did in fact cost to finish it. But these ways all lead to the same end; what is the difference in value between the unfinished house and a house had it been finished as agreed upon. And this is to be observed of the last-named kind of testimony; *first*, that the plaintiff is not under obligation to go on and finish the house; *second*, that *he cannot always finish it, as he could not in the case in hand, at the day called for by the contract, when there will come into the damages the element spoken of by Marvin, J., in* 33 *N. Y.** (*supra*) *of loss from delays;*"

That is, as the Circuit Court of Appeals stated, there are three kinds of testimony as to difference in value:

(1) Experts as to the difference in value;

(2) experts as to the cost of completion; and

(3) actual cost of completion.

As to the items of omission and substitution which the plaintiff did not in fact supply, it introduced testimony as to what it would have cost "to complete the unfinished house up to the mark of the contract".

As to the work of completion which the plaintiff in fact undertook and carried through, it introduced testimony of "what it did in fact cost to finish it".

Morrell v. Irving Fire Insurance Co. 33 N. Y. 429.

Bearing in mind what the Court of Appeals had said of this third type of testimony, that "he cannot always finish it * * * at the day called for by the contract when there will come into the damages the elements * * * of loss from delays", the plaintiff introduced evidence as to what constituted the loss from delay; and used the minimum figures, properly applicable to a mortgagee of lost interest, taxes, and insurance premiums. An owner may be entitled to recover the entire rental value of the premises as damages for delay in completing, but it does not follow that a mortgagee is entitled to the same measure of damages, which might give him a profit over and above his rights under the mortgage.

The Circuit Court of Appeals seems to have proceeded on the notion of a theoretical absolute value of the building independent of the time element, and to have disregarded the fact that the building loan agreement and the bond called for a completion of the building on or before December 16, 1930. In doing so they have likewise disregarded the law of New York as stated in the *Kidd* case, that damages from delay, in the nature of "interest on mortgages on the lots, the taxes thereon, and insurance premiums" (83 N. Y. at 398) must be considered in fixing the value of what has been lost.

II.

The Provisions of the Surety Bond in This Case Specifically Obligated the Surety to Pay Interest on the Loan, and Taxes and Insurance on the Mortgaged Property, Until the Date of Actual Completion of the Building in Accordance With the Plans and Specifications.

The statement of the Circuit Court of Appeals (R. 884) that "there is no condition, express or implied, respecting payment of the principal or the interest on the loan, taxes

or insurance'' flagrantly disregards the provisions of the bond in this case, and prejudices the interests of all lenders, whether individual, corporate or governmental, who have made loans on the basis of similar bonds.

Included in the obligations of the defendants contained in the surety bond is the following:

> '', and shall *make good* any and every other *default by the Principal in performing* any of the other terms, *covenants* or conditions in said *building loan agreement* set forth by the Principal to be kept and performed *up to and including the completion of and payment for said building* and installation of and payment for said equipment * * * within the time aforesaid'' (R., p. 596-97).

The surety bond makes the building loan agreement and all and singular the terms thereof, a part of the Surety Bond (R. p. 592-93) and in such surety bond the defendants state that they ''are thoroughly familiar with all of the terms, provisions, conditions and requirements contained in said building loan agreement'' (R. p. 595).

Turning then to the covenants of the Principal set forth in that building loan agreement, we find the following (R. p. 568):

> ''and the Borrower'' (Principal, Central Park Properties, Inc.) ''agrees * * * to perform and comply with all and every of the covenants, terms and conditions herein and *in said bond and mortgage contained,*''

and the building loan agreement further specifies (R. p. 568) that ''Said loan shall be evidenced and secured by the bond of the Borrower'' and also (R. p. 569):

> ''Third: Said bond shall be conditioned for the repayment of the amounts advanced thereon on the 16th day of December, 1930; together with interest at the rate of six (6%) per centum per annum due and pay-

able on the 16th day of December, 1930, and quarter-annually thereafter and as hereinafter provided."

The building loan agreement further provides that interest on the full principal amount shall run from the date fixed for completion, whether or not the building be completed on that day (R. p. 570).

It follows, therefore, that when the defendants in their surety bond undertook to make good any default by the Principal

> "in performing any of the * * * covenants * * * in said building loan agreement set forth by the Principal to be kept and performed *up to and including the completion*"

of said building and the installation of the equipment, the defendants assumed a definite contract obligation to pay the interest which the Court has awarded, viz., interest on the principal of the loan from December 16, 1930 to October 1, 1931, the date of the "completion of the building."

Citations by the Circuit Court of Appeals to the effect that "in the absence of express contract to pay interest, interest as damages cannot be recovered apart from the principal of the debt", have no application to the present case because (1) as above shown, there was an express contract to guarantee interest up to and including the completion of and payment for said building, (2) the rule has no application to a suit such as this is, for damages by loss of interest on an investment;

Meyer v. *Haven,* 70 App. Div. 529
Wood v. *Joliet Gas Light Co.,* 111 Fed. 463
DeFord v. *Maryland Steel Co.,* 113 Fed. 72 (C. C. A. 4)
New York, etc. Mining Co. v. *Fraser,* 130 U. S. 611

See Sutherland Damages, Section 703, and (3) loss of interest was part of the damages within the contemplation of the parties (see III, *infra*).

As to insurance: The building loan agreement requires the principal to pay (R. p. 580-81):

> "fire, lightning and steam boiler explosion insurance, together with any other insurance deemed necessary by Lender" (Plaintiff).

As to taxes: The surety bond itself recites that the bond is to guarantee completion of the building on December 16, 1930, in strict accordance with the building loan agreement and plans and specifications, and also "free from all liens."

Also among the obligations of the Principal as set forth in the building loan agreement was the obligation that plaintiff's mortgage was to be "a valid first lien upon the premises" "free and clear of all liens and encumbrances" (R. p. 568).

Certainly the above obligations were breached by the nonpayment of taxes. How can a mortgage be a first lien, as defendants guaranteed this to be, unless taxes on the mortgaged property are paid?

Moreover, payment of taxes is also covered by the provisions of the building loan agreement at folio 1726 giving plaintiff, as Lender, the right to apply any part of any advance in payment of interest or taxes due and that the amounts so applied shall be deemed advanced to Central Park Properties, Inc., clearly show the principal was obligated to pay these items.

The building loan agreement certainly did contemplate a building which when completed was to be free and clear of taxes and was to be with proper insurance pending completion.

We believe it is obvious, moreover, that taxes and insurance premiums were necessary expenditures for the completion of the building; otherwise in the case of fire or sale for unpaid taxes, plaintiff would have had no building even after having completed it.

III.

Aside from the Express Provisions of the Bond Requiring Payment of Interest, Taxes and Insurance, Their Recovery as Damages Involves a Question of Fact as to What Was Contemplated by the Parties; and This Fact Supported by Evidence and Found by the District Court, Was Not Open to Review by the Circuit Court of Appeals.

This is a suit on a contract.

The rule is an old and familiar one that the measure of damages on a contract includes all such as may be reasonably supposed to have been in the contemplation of the parties. *Hadley* v. *Baxendale,* 9 Exch. 341, 354, 356, approved by this Court in *Howard* v. *Stillwell & Bierce Mfg. Co.,* 139 U. S. 199, 207.

> *The question of what damages were contemplated by the parties at the time the contract was made is a question of fact.*

That what damages were contemplated is a question of fact follows from the original case of *Hadley* v. *Baxendale,* (9 Exch. at 354-55), which describes it as a problem for the jury.

> "Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated." *

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*Quotation is from *Howard* v. *Stillwell & Bierce Mfg. Co.* (139 U. S. 199, 207).

Other courts also have uniformly treated the question as one of fact:

Delafield v. *Armsby Co.*, 131 App. Div. 572, 586, aff'd 199 N. Y. 518;
Holt Mfg. Co. v. *Thornton*, 136 Cal. 232, 68 Pac. 708;
McMahon v. *Field*, 7 Q. B. Div. 591.

The trial court in including interest, taxes and insurance in its measure of damages, therefore decided a question of fact as to what damages were contemplated by the parties. In reversing that finding, the Circuit Court of Appeals violated the well recognized rule that where both parties have moved for the direction of a verdict they are concluded by the court's findings on all issues of fact, and the decision is not open to review if there be any evidence to support it.

Beuttell v. *Magone*, 157 U. S. 154
Clapper v. *Gamble*, 28 F. (2d) 755, 758 (C. C. A. 8)
American etc. v. *Spielberg*, 262 F. 492
Williams v. *Vreeland*, 250 U. S. 295, 298.

So far from there being no evidence that loss of interest and accruing taxes and insurance were one of the contemplated damages from failure to complete on time, the defendant on the trial never disputed the fact. The documents themselves prove that such damages were contemplated, and that these possible losses were one of the reasons for requiring a bond of $3,000,000.

The Prudence Company is an investment Company. It was making a mortgage loan in installments, bearing 6% interest, and under a building loan agreement which required payment of taxes and insurance. The sureties were familiar with all the provisions of the building loan agreement (R. p. 595). Both the bond and the building loan agreement repeatedly emphasized the purpose to have the proposed building "fully completed and ready for occu-

pancy as a modern hotel *not later than the 16th day of December, 1930.*"

Obviously, the importance of the fixed date for completion was that plaintiff as mortgagee wished to be assured that on that date it would have a completed building to secure payment of interest on its investment, and taxes and insurance on the building.

The contract, moreover, was made in the light of the existing law under which (1) interest, taxes and insurance had been authoritatively referred to as one of the damages to a mortgagee to be contemplated by reason of delay in the completion of a building (*Kidd* v. *McCormick*, 83 N. Y. 391; *Trainor* v. *Aetna Casualty Co.*, 290 U. S. 47, 55) and (2) that loss of interest caused by another party's delay might be recovered as damages even though such defendant was not liable for the principal obligation (*Meyer* v. *Haven*, 70 App. Div. 529).

The ruling of the Circuit Court of Appeals that such damages were not contemplated appears, therefore, to be utterly untenable.

The parties must have had in mind also the many legal and accounting authorities which treat interest during the period of construction on the capital invested in the project, and taxes and insurance on the property during such period, as part of the cost of construction. This Court has held them to be part of the cost of construction in *Ohio Utilities Co.* v. *Commission*, 267 U. S. 359, 361-63.

See also:

Natural Gas Co. v. *Public Service Comm.*, 95 W. Va. 557, 573.

Horwath & Toth, Hotel Accounting (1928), page 284, where the authors state:

"The cost of a new hotel includes the contract price as adjusted by extras and allowances resulting from changes in plans and in specifications, architect's fees,

interest on borrowed money and real estate taxes during construction, and * * * insurance."

Under those authorities in fact, interest, taxes and insurance became part of the damages specifically agreed to be paid; for in addition to the provisions already quoted (*supra* pages 27-29) the surety bond contained an agreement by the surety for the payment of "the entire cost of erection, construction and completion of said building" (R. p. 596), which would include interest, taxes and insurance.

The amount of interest, taxes and insurance would increase as the project approached completion and the investment in it increased; therefore, as the parties obviously contemplated when the contract was made, they become an increasingly important element of damages.

Plaintiff has proved the total actual cost of completion, a form of evidence more accurate than, and preferable to, the uncertain alternative of experf estimates as to cost of completion or difference in value.

The plaintiff was not obligated to prove loss of rent during the period of incompletion. It never claimed loss of rent. If it had claimed and proved loss of rent the defendants would certainly have insisted that the damages be restricted to what the plaintiff has claimed, and the trial court actually allowed, namely, interest, taxes and insurance.

The loss by delay which is contemplated in the case of a mortgagee is not a loss of rent, but a loss of interest, together with damages by reason of taxes and insurance required to be paid for the period of delay, and not a "loss of profits". (See opinion, R. 884.)

The parties must have contemplated when the building loan agreement and surety bond were executed, that the building when erected would rent for more than enough to pay interest on the mortgage, and taxes, insurance premi-

ums and other carrying charges. Otherwise, (1) Central Park Properties would never have undertaken to erect the building, and (2) The Prudence Company would not have agreed to lend money on its security for its erection.

The defendants offered no evidence to show that this normal and inevitable belief that rental value would exceed interest, taxes and insurance was wrong, or that such rental value was in fact less than interest, taxes and insurance. Surely no court can properly purport to take judicial notice that the rental value of a modern apartment hotel, fronting on Central Park South, in New York City, would not in 1932 equal its carrying charges—especially to use such assumption as a basis for reversing a finding of the trial court.

The action of the Circuit Court of Appeals in reversing the District Court's decision as to what was in fact contemplated as damages, and in eliminating an item of damages which is clearly within the contemplation of the parties to a mortgagee's completion bond, involves a further departure from the *Kidd* and *Trainor* cases and from accepted law, and presents an issue of sufficient importance to justify the reviewing action of this Court.

IV.

Even Assuming, for the Purpose of Argument, That the Contract in This Case (The Surety Bond) Could be Orally Changed by the Parties Thereto, Nevertheless the Circuit Court of Appeals Has Confused the Contract Which it Says Was Changed.

There Is No Pretense in the Record That the Parties to the Surety Bond Ever Undertook or Attempted to Change the Provisions of the Surety Bond.

There is a fundamental fallacy in the Circuit Court of Appeals' finding of evidence "tending to show" parole waiver, altogether apart from the fact, discussed in the

next Point, that the principle which permits such waiver on certain occasions was misapplied in this case. The fallacy lies in the Court's confusion of the instrument which it is claimed was changed.

The omissions and substitutions which are the subject of the complaint herein, constituted a violation of the *building loan agreement.*

The contract on which the suit is brought is the *surety bond,* which guaranteed performance of the building loan agreement. It was the surety bond itself, *not* the building loan agreement, which provided that plaintiff should not be bound by any changes from the plans and specifications, unless (1) in writing, (2) approved by duly authorized officers of the plaintiff, and (3) specifying the particular items so released.

No evidence was introduced or offered that any change was made in the surety bond, orally or otherwise. That contract, therefore, still stands unchanged, and is just as binding today as it was the day it was signed.

There was a real purpose in placing the provision with respect to waiver in the surety bond and not in the building loan agreement. Courts and counsel are familiar with the fact that oral waivers and consents to variations are stock-defenses set up by sureties when called upon to make good under their bonds. It was intended to provide assurance against such a defense, so that with respect to the defendants' liability on this surety bond, no one could bind the plaintiff to any variances from the complicated plans and specifications (15 sheets of blue print plans and 34 leaflets of specifications), without complying with definite formalities. The necessity of such formalities in order to prevent confusion and uncertainty on a job of the size and complexity of this building—only one of 120 buildings which plaintiff had to watch—is apparent. It was because

of this that plaintiff required as a condition to making the building loan, that it have the surety's guaranty, in the bond itself, that no variances from the plans and specifications could be made or claimed to have been made without the protections afforded by the waiver clause.

The Circuit Court of Appeals has taken away this protection, and deprived plaintiff of a substantial right for which it expressly contracted. The failure of the Circuit Court of Appeals to consider or discuss the significance of the fact that the waiver restrictions were contained in the surety bond rather than simply in the building loan agreement, makes it important that this Court review and correct such decision, which involves an important question of general law that has been determined in a way clearly untenable.

V.

The Evidence, the Exclusion of Which Was Made a Basis of Reversal by the Circuit Court of Appeals, Did Not "Tend to Show" Any Waiver of the Plans and Specifications or Consent to Substitutions.

The Circuit Court of Appeals stated (R. 882-883):

> "Evidence was offered tending to show that the President of the Appellee consented to substitutions made, and it was excluded. * * * Such a parole waiver or consent would be legally effective * * * (citing cases) if the Appellee's President had authority to waive the requirement of a written waiver or consent. Excluding such evidence was prejudicial error."

The only evidence to which the opinion of the Circuit Court of Appeals is applicable is contained in the following passage from the cross-examination of Frank Grad, architect for the principal during the early stages of the building (R. p. 213):

"Q. At any time after you left the Lefcourt organization, or rather at any time after June, 1930, when you say your connection with this job ceased, and prior to December, 1930, did you have any talk with Mr. Waterman of The Prudence Company? A. Yes, I believe I had.

Q. And what was the nature of the talk that you had with him? A. I just told him that I was—I was to see him about another loan, to start with, and I told him that I had severed connections with the job and if anything goes wrong not to hold it against me because I am through.

Q. And didn't you tell him at that time about certain things which in your opinion were not in accordance with the plans and specifications?

Mr. Schenck: I object to this on the ground that it is irrelevant and not proper cross examination."

The sustaining of this objection is the one thread of error upon which a judgment for $781,694.56 has been reversed, and a new trial ordered.

Not only is there no evidence of any writing, nor is there any evidence that Mr. Waterman was authorized to waive variations from the plans and specifications, but also there did not purport to be any specific or particular items released.

Even an officer having general authority has been held not empowered to depart from requirements for written waiver in building specifications. Thus, in *Traitel Marble Company* v. *Brown Bros. Inc.*, 159 App. Div. 485, the defendant's Secretary-Treasurer, who also acted as its architect, was held not authorized to orally permit the substitution of one class of tile for another where the building contract provided that "no alterations shall be made in the work, except upon the written order of the architect."—this although such an officer has general authority under New York law.

In this instant case, there was affirmative evidence that the power to waive any provisions of the plans and specifications was vested in a special committee (R. pp. 136-37, 684-85). When specific officers have been charged with the joint duty of watching over the details of a particular job, the right of any other officer to overrule, without consultation, is excluded by every consideration of business efficiency or of common sense.

The doctrine of *Northern Assurance Company* v. *Grandbein*, 183 U. S. 308, 352 and *Beatty* v. *Guggenheim*, 225 N. Y. 380, that there can under certain circumstances be a parole waiver of written requirements for written waiver, is one of comparatively recent origin, developed to prevent forfeiture of insurance policies. Neither of the above cases, cited by the Circuit Court of Appeals in support of the doctrine, dealt with the details of a building contract, where there is peculiar necessity for the certainty which is afforded by specific written waivers.

In building contracts, the New York courts have repeatedly insisted upon strict compliance with provisions restricting the forms of authorization for variations from specifications or for extra work.

Kelly v. *St. Michael's R. C. Church*, 148 App. Div. 767, 773-5;

Molloy v. *Briarcliff Manor*, 145 App. Div. 483, 491;

Walsh v. *Howard & Childs*, 61 Misc. 328, 331;

Woodruff v. *Rochester & Pittsburgh R. R. Company*, 108 N. Y. 39.

Langley v. *Rouss*, 185 N. Y. 201, wherein the Court of Appeals stated:

"* * * *Where contracts including plans and specifications involve a great amount of detail*, and the merits of claims for alterations and extra work are dif-

ficult to determine and adjust after the work is completed, *a provision requiring the contractor to submit itemized estimates of the expense of proposed alterations or extra work and that the order of the architect therefor should be in writing, is reasonable and tends to a more definite understanding and avoids controversies.* The contractor is not required to make changes or perform extra work unless he first receives written authority therefor and the contract is, therefore, neither unreasonable nor severe and it should be enforced. An agent cannot enlarge his own powers by waiving the limitations thereon." (p. 206)

Moreover, there was not even any evidence offered in this case that the President purported to waive anything.

The most which can be said of the evidence which was excluded, is that a person formerly employed by the principal, who did not pretend at that time to represent any of the parties, undertook to make some oral statement to the President of The Prudence Company with respect to some unspecified changes from the plans and specifications or substitutions which he said the principal had already made in erecting the building.

No case has ever held that waiver can be proved without any request by or communication to the obligor.

No evidence was offered as to any of the specific changes which Mr. Grad may have mentioned. No inference can be drawn that any of them are included in the omissions and substitutions for which recovery was sought. Certain changes had admittedly been approved by the Committee (R. pp. 683-705) and plaintiff makes no claim with respect to those changes or omissions. There is no virtue or force in showing that Grad spoke of changes without showing that they were unapproved changes.

But the defect in this so-called testimony is more fundamental. Waiver of provisions of a written contract become

operative by way of estoppel. (*United Firemen's Ins. Co.* v. *Thomas,* 82 Fed. 406, 409). The notion of a waiver without any communication by or to the party obligated is unheard of. Certainly waiver must be the result of a transaction between the two parties to the contract. Or if the waiver be regarded as a subsequent oral agreement, it must be an agreement with the party to be relieved.

Remarks of a disgruntled ex-employee, or any other outsider, to the obligee, have never before been considered to prove, or even "tend to show" a waiver of contract rights by the obligee. The holding of waiver of contract provisions without any request therefor, or communication thereof to the party bound, so far departs from any accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The point has particular importance in this case because it was only the exclusion of this evidence which required a new trial under the opinion of the Circuit Court of Appeals. But for the totally erroneous ruling on the questions put to Grad, the Circuit Court of Appeals (even assuming for the purpose of argument that any error could be predicated upon the holding with respect to interest, taxes or insurance) should properly have modified or conditionally affirmed the decision of the lower court instead of directing a new trial on issues already fully litigated.

United States v. *Salmon,* 42 F. (2d) 353 (C. C. A. 5);

United States Potash Co. v. *McNutt,* 70 F. (2d) 126, 132 (C. C. A. 10);

Becker Bros. v. *United States,* 7 F. (2d) 3 (C. C. A. 2);

Board of Education v. *Maryland Casualty Co.,* 27 F. (2d) 20, 23 (C. C. A. 3).

Cf. Baltimore & Carolina Line v. *Redman.* 79 L. Ed. 944, as to the power of the reviewing court over a verdict.

A new trial of a case of this magnitude because of one question put to Mr. Grad—irrelevant, immaterial, and properly excluded—is a gross injustice, which this Court ought not permit to pass uncorrected.

Conclusion.

The petition for a writ of certiorari should be granted.

Dated, New York, July 23, 1936.

ALFRED T. DAVISON,
Counsel for Petitioner,
The Prudence Company, Inc.

(6683-C)

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IN THE

Supreme Court of the United States

October Term, 1935

No. 270

THE PRUDENCE COMPANY, INC.,

Petitioner

v.

FIDELITY & DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The grounds for petitioner's recovery of interest, taxes and insurance premiums as part of the damages under the surety bond, are threefold:

1. Interest, taxes and insurance premiums are recoverable as a part of the damages contemplated when the surety bond—guaranteeing not only completion of the building but performance of the building loan agreement—was executed and delivered. *Trainor* v. *Aetna Casualty Company* and *Kidd* v. *McCormick* by their language conclusively show that these items are within the contemplation of the parties when a surety bond of the nature of the one in this case, is delivered.

2. Such items are necessarily included in the difference between the value of the property, as of the date on which the building was to have been completed, and the value of the property with the building fully completed, as guaranteed, because necessarily a willing buyer would deduct from any price he otherwise would pay not only the cost of labor and materials necessary to complete the building up to the mark of the contract, but also the taxes and insurance he would be required to pay during completion and the interest during the period of completion on the amount so paid. In other words, such items constitute part of the "cost of completion."

3. Under the terms of the particular agreements here involved, defendants have by their surety bond expressly bound themselves, even apart from the general principles of law above mentioned, to pay interest, taxes and insurance premiums up to and including completion of the building.

All three of the above grounds for sustaining the judgment of the District Court were argued below, respondents' claims (Brief, p. 18) to the contrary notwithstanding.

With Reference to Respondents' Supplementary Statement of Facts

At the outset, it is necessary to correct several of the statements in the supplementary statement of facts in respondents' brief:

1. The attempt by respondents to narrow the effect of the surety bond in this case by calling it a completion bond, while all too obvious in purpose, cannot succeed, in view of the very broad and inclusive terms of the bond itself, which guaranteed not only completion of the building but also performance of all the provisions of the building loan agreement, *including* the provision for payment of interest on the bond and mortgage up to the completion of the building.

Respondents' statement at the top of page 2 that

> "nowhere in respondents' bond is there any provision guaranteeing performance of the provisions of the bond and mortgage".

is flatly contrary to the express provision of the bond which is that

> "said Surety * * * shall make good any and every other default by the Principal in performing any of the other terms, covenants or conditions in said building loan agreement set forth, by the Principal to be kept and performed up to and including the completion of and payment for said building" (R. p. 596)

and the provision of the building loan agreement which was made part of the bond that

> "interest on the full principal amount shall run from the date herein fixed for completion * * *. The provisions of this paragraph shall not relieve the Borrower from the obligation to pay interest on the quarter annual dates" (R. p. 570).

and the further covenant of the building loan agreement wherein the Principal agreed to

> "perform and comply with all and every of the covenants, terms and conditions herein *and in said bond and mortgage* contained" (R. p. 568)—

and that bond and mortgage did contain an express covenant to pay interest (see subdivision "Third" of Building Loan Agreement, R. p. 570).

Aside from the obligations expressly contained in the surety bond, that surety bond and the building loan agreement which was made a part of it are implicit with the intention—and, therefore, it was within the contemplation of the parties—that a building "ready for occupancy" was to be security for the building loan.

Respondents' brief does not dispute the defaults under the building loan agreement, the expenditures made by The Prudence Company, Inc. (including expenses for taxes and insurance premiums), the existence of the omissions and substitutions complained of, nor the fact that the Prudence Company, Inc. received no interest on its loan of over Six Million Dollars subsequent to December 16, 1930.

2. The bond of Mr. Lefcourt (Ex. 10) is not comparable with the respondents' surety bond. It expired according to its terms *before* the date on which the building was to have been completed, or the maturity of the mortgage. Respondents neglect to quote the provision (R. p. 681) that the obligation under the guarantee should cease on the issuance of the "customary certificates of occupancy," which are not certificates of completion (R. p. 494), and which were issued in October, 1930 (R. pp. 79, 712).

3. Respondents' statement (their brief, p. 2) that there was no evidence of what would have been a reason-

able time within which to complete the building is altogether unjustified. Petitioner did prove that the time taken for completion was reasonable.

When petitioner's witness, Mr. Lukach, testified that he was there every day and every hour of every day (R. p. 237), and that the cost of completion as set forth in Exhibit 84 was the reasonable cost of completion (R. p. 233), he covered every possible question there could be concerning the time necessary for the completion. The time necessary for completion is an inherent element of the cost of completion, and testimony of the reasonable cost of completion necessarily includes the fact that the time required for completion was entirely reasonable. Especially in this so here, because the payrolls which were included in the cost of completion (Ex. 84, at R. p. 761) necessarily involved the question of time. Labor cannot be considered apart from the element of time.

As against the actual facts and the actual time taken for completion, respondents now refer only to the testimony of the witness Banfield that, in his opinion, it would have taken between four and eight weeks to complete the different items listed on Schedule A (Ex. 84, R. p. 436). The fact is, however, that Mr. Banfield admitted (R. p. 370) that he had not gone over the plans and specifications and had not made a thorough study. He, of course, could not have had in mind the special difficulties inherent in picking up a job abandoned by the builder.

The District Court was perfectly justified in refusing to give any weight to such a rough off-hand estimate of Mr. Banfield.

At the most, therefore, respondents' statement repeats a contention of fact on which the weight of evidence was against them, and the finding of fact of the trial Judge was conclusive.

4. The allegation that petitioner lost no interest after its dummy bought in the premises at the foreclosure sale almost answers itself. Admittedly, petitioner still received no interest and—so far from getting any return on its investment of $6,575,000—was compelled to continue expenditures on the completion of the building.

5. Another incorrect statement appears on page 20 of respondents' brief, where they would make it appear that the liens against which the bond provided were restricted to mechanics' liens, and therefore could not include taxes. The provision cited and relied on by petitioner is not that quoted at page 20 of respondents' brief from page 596 of the Record, but rather the covenant in the building loan agreement (R. p. 568) that plaintiff's mortgage, as stated at page 29 of our brief, was to be a "valid first lien upon the premises," "free and clear of all liens and encumbrances."

6. It cannot be gainsaid that plaintiff in its complaint specifically claimed interest, taxes and insurance premiums as part of the damages, in the same paragraph and the same list as the cost of labor and materials and the other items were claimed. This action and the defendants' liability are predicated on the surety bond and the building loan agreement, which by stipulation (R. p. 520b) were part of the pleadings on the preliminary motions addressed to the sufficiency of the answers of the defendants.

7. Respondents have failed to state that the deficiency judgment which was entered April 3 (should be April 30), 1931 (R. p. 20) was for $716,215.02 which, with interest from April 30, 1931, is more than the amount of the judgment obtained by plaintiff in this case. Respondents have

also failed to state that the purchaser on the foreclosure sale in which the deficiency judgment was entered, was James T. Harrigan, who "represented and was a nominee of, this plaintiff." (See the allegation of complaint, R. p. 20—the same page as respondents have cited—which allegation of the complaint was expressly offered in evidence by the respondents themselves, R. p. 314).

8. For respondents to state on page 4 that

> "As a matter of fact, petitioner did not lose interest on $6,000,000 between March 17, 1931 and October 1, 1931, because it sold the very same premises for $6,000,000 on March 17, 1931"

is a flat misstatement of fact in view of the *undisputed* fact in this case that the purchaser on the foreclosure sale on March 17, 1931 "represented and was a nominee of this plaintiff" (R. p. 20). The quotation last made is from subdivision marked "XXXIX" of the complaint which was offered in evidence by the respondents themselves on the trial (R. p. 314).

I

In Reply to Respondents' Point I

A (in Respondents' Brief)

The attempt by respondents to show that parts of the opinion of Mr. Justice SUTHERLAND in *Trainor* v. *Aetna Casualty Co.* were *dicta,* is tantamount to an admission by respondents that they believe that this Court's opinion in that case with respect to interest, taxes and insurance premiums is contrary to the contentions they are now advancing, and also that the Circuit Court of Appeals disregarded the opinion of this Court.

While this Court is better able than anyone else to discern *dicta,* we respectfully submit that under that part of the decision in the *Trainor* case which is quoted on pages 8 and 9 of respondents' brief, namely:

> "Petitioner is entitled to be put in as good position *in respect of its debt* as it would have occupied if the buildings had been completed in accordance with the terms of the undertaking; and this can be done *here* only by giving it the amount of the difference between the value of the unfinished buildings and their value as it would have been if completed in accordance with the agreement—see *Kidd* v. *McCormick, supra,* p. 398—but exceeding neither the amount due on its debt nor the amount of the bond"

petitioner is not "put in as good position *in respect of its debt* as it would have occupied if the building had been completed in accordance with the terms of the undertaking" unless petitioner recovers interest, taxes and insurance premiums during the period of completion.

Obviously, the income of the building was designed to be security for interest, taxes and insurance, and it is equally obvious that when the building was not completed, there was no income to cover interest, taxes and insurance.

Respondents would treat the position of the plaintiff in this case exactly the same as if there were no building on the property, which was the security for the mortgage, and would relegate petitioner to the same position as if it had a mortgage on unoccupied property.

The trial Court's interpretation of *Trainor* v. *Aetna Casualty Co.,* 290 U. S. 47, and *Kidd* v. *McCormick,* 83 N. Y. 391 (see respondents' brief, p. 8) shows what must have been the understanding and contemplation not only of courts but of sureties and builders dealing with them,

as to the meaning of those cases, namely, that interest, taxes and insurance premiums were part of the damages suffered by default under the building loan agreement.

The Circuit Court of Appeals, although quoting a part of this Court's opinion (see respondents' brief, p. 4), made no attempt to apply it to the facts of the instant case, or to explain why they refused to allow the very items of damages which this Court had stated should be taken into consideration. The cases cited at page 10 of respondents' brief do not disprove the right to interest, taxes and insurance premiums.

United Real Estate Co. v. *McDonald,* 140 Mo. 605, 612, was cited by the *plaintiff* in the *Trainor* case (brief in this Court, pp. 16, 17), only on the point of the difference between a bond of guaranty and a bond of indemnity. The bond here involved, as already set forth, is both a guaranty of completion and indemnity.

Province Securities Corp. v. *Maryland Casualty Co.,* 269 Mass. 75, was one of the cases cited by the *defendant* in the *Trainor* case, and which this Court refused to follow as contrary to the weight of authority and of reason.

Nor can respondents find any support for their argument in their claim with respect to the so-called "date of the default" because:

> 1. If December 16, 1930, the date on which the building was to be completed, is taken as the date of the default, plaintiff's loss on that day would be not only the cost of labor and material necessary for completion, and the reasonable value of omissions and substitutions, but also interest, taxes and insurance premiums during completion; or if the loss is to be computed on the basis of difference in value between the building as of December 16, 1930,

and what the building would have been worth had the building been completed up to the mark of the contract, one of the elements going into that difference in value would inevitably be the amount which a willing buyer would have to deduct from the price which he would otherwise pay for the property on December 16, 1930, in order to cover interest on his investment and taxes and insurance during the period of completion.

2. Those provisions of the surety bond in which the defendants agreed

> "to make good any and every other default by the Principal in performing any of the other terms, covenants or conditions in said building loan agreement set forth by the Principal to be kept and performed up to and including the completion of and payment for said building" (R. p. 596)

would carry the date of the default up to the completion of the building.

The fact that on December 16, interest, taxes and insurance premiums during completion would have to be estimated is no reason why they should not be included in the damages.

Under both the *Trainor* and *Kidd* cases, as well as the other authorities on the subject, the difference in value at the date of default may be shown by proving the cost "to complete the unfinished house up to the mark of the contract," whether it is actually completed or not. Petitioner's evidence was exactly within that rule.

B (in Respondents' Brief)

For respondents to argue that petitioner's loss of interest, taxes and insurance premiums was caused by the default of the mortgagor in paying the amounts due under the mortgage and not by failure to complete the building is not only a distinction without a difference, but also directly contrary to this Court's decision in the *Trainor* case, as well as directly contrary to the basic facts in this case.

Petitioner's loss was in not having a completed building on December 16, 1930.

Because petitioner did not have a completed building "ready for occupancy" (as required by the surety bond—R. p. 595—) petitioner was deprived of a source of income out of which it could recoup itself for interest, taxes and insurance premiums.

Moreover, when this Court said in the *Trainor* case:

> "Petitioner is entitled to be put in as good position *in respect of its debt* as it would have occupied if the buildings had been completed in accordance with the terms of the undertaking;"

this Court meant, we respectfully submit, that the loss of the security for the debt directly affected the petitioner *in respect of its debt.*

It follows, therefore, that failure to complete the building was the proximate cause of loss to the petitioner, because it was thereby deprived of a property out of which it could have derived an income for interest, taxes and insurance premiums.

It is sheer nonsense for a surety to argue that there is no connection between default on the building loan agreement and default on the mortgage (see Respondents'

Brief, pp. 12-13). The fact that the payment of the mortgage debt depends to a large extent upon the completion of a revenue producing building is the reason for and in fact the justification for a surety bond.

Respondents' statement on page 13 of their brief, that petitioner would not have received interest on its mortgage if the respondents had completed the building is difficult to understand and is belied by the fact that petitioner in this case refused to make the loan until it had respondents' bond, guaranteeing the completion of the building, from which it could derive an income sufficient to pay interest, taxes and insurance premiums (see our Main Brief, pp. 33-34).

C (in Respondents' Brief)

That one may be liable for the interest which his default prevents a party from obtaining on an independent contract and that interest as damages may be entirely separate and apart from interest on principal not only follows from the law with respect to contemplated damages, but also is adequately shown by *Meyer* v. *Haven*, 70 App. Div. 529, and the other authorities cited at page 28 of our brief, which respondents make no attempt to answer.

Hamilton v. *Van Rensselaer*, 43 N. Y. 244 (brief, p. 14) has no application here. That case held that a guaranty of interest did not without other words cover interest accruing after the maturity of the principal debt. Respondents' obligation in this case extends "up to and including the completion of and payment for said building" (R. p. 596-97), that is to October 1, 1931.

II

In Reply to Respondents' Point II

Respondents have failed to even attempt to answer, refer to or explain the specific provisions of their surety bond and the building loan agreement which we have cited by line and page in our brief.

This case does not require a decision whether the surety bond obligated the respondents to pay the principal due under the building loan agreement up to the amount of their bond. It is sufficient that (in addition to interest, taxes and insurance premiums being within the contemplation of the parties) the surety bond clearly *did* obligate respondents to pay interest on the amount advanced under the building loan up to the actual completion of the building "ready for occupancy as a modern hotel".

Nor can the respondents escape the specific provisions of their surety bond and the building loan agreement by any claim of a practical interpretation by the parties, because, obviously, no specific claim for interest, taxes and insurance premiums could be made until

> (1) it had first been determined whether the sureties themselves would complete the building and how long they would require
>
> and
>
> (2) the building had been completed and thus the amount of interest, taxes and insurance premiums definitely known.

Respondents cannot point to a single act of petitioner *after* the building had been completed, which in any way negatives petitioner's claim to interest, taxes and insur-

ance premiums. As we have stated, the default under the surety bond continued until after the building had been completed.

We have already fully answered respondents' claim (brief, p. 19) with respect to taxes (*supra*, p. 6).

We have also fully answered respondents' attempt to show that petitioner has discarded the argument made by the Trial Court for the inclusion of taxes and insurance premiums in the damages (*supra*, pp. 1-2).

Respondents' claim (p. 19) that paragraph Fourteenth of the building loan agreement "*simply* requires the borrower *to place* all insurance through a designated insurance broker" (R. pp. 580-581) (italics ours) is futile on its face.

Can anyone question the fact that when a person "places an order," such person obligates himself to pay therefor?

III

In Reply to Respondents' Point III

It is too well settled to admit of argument, we submit, that what parties contemplated as damages *is* a question of fact.

The question of rental value of the building was first injected into the case by the Circuit Court of Appeals (see Opinion, R. p. 884). We referred to it in our main brief on this application (pp. 33-34), for the purpose of showing that plaintiff was not seeking to recover *profits* equal to the possible rental value of the building, but only its *losses* as mortgagee (namely, taxes, interest and insurance), which the parties must have contemplated that the completed building, not only could, but would be able to pay out of its rentals.

IV

In Reply to Respondents' Point IV

A very simple analysis very clearly shows the error of the Circuit Court of Appeals and the fallacy of respondents' argument with respect to the so-called parole waiver.

This action is predicated on the surety bond given by the respondents.

In that surety bond, the respondents agreed (R. p. 604) that no waiver or release by petitioner of any default or omission by the principal in complying with the building loan agreement or the plans and specifications would be binding upon the petitioner, unless such waiver or release should be in writing and signed by the duly authorized officers of the petitioner and specifically refer to the item or items specifically so released.

Who changed that agreement?

Respondents' counsel specifically state that that agreement was not changed. We quote from page 24 of their brief (italics ours):

> "Strictly speaking, the evidence excluded was offered to establish a waiver of strict performance *of the building loan agreement.*"

Mr. Justice CARDOZO, in *Beatty* v. *Guggenheim Exploration Co.*, 225 N. Y. 380, 388, referred to the law that

> "Whenever two men contract, no limitation self-imposed can destroy their power to contract again."

It is not claimed by anyone in this case that the surety bond or the above provision in the surety bond was ever

changed by anyone. Not only do respondents' counsel themselves say that the evidence offered was to establish waiver of the building loan agreement, but the fact is that *there is no claim that there is any scintilla of evidence that the respondents and petitioner ever talked together with respect to the provisions of this surety bond.*

Why, therefore, is not the above obligation of the respondents in their surety bond to the effect that no waiver or release shall be binding upon petitioner, unless (1) in writing; (2) signed by duly authorized officers, and (3) specifically referring to the items released, still in full force and effect today?

It follows from the plain, undisputed facts in this case that respondents, by their own agreement, which has in no way been changed, have estopped themselves from claiming any oral waiver or release.

It follows, therefore, that no parole evidence "tending to show" any waiver of the plans and specifications or consent to substitutions can possibly relieve the *respondents* from the provisions of their surety bond (which, as we have stated, even respondents' counsel admit have not been changed).

Respondents were paid for protection to petitioner against the uncertainties of the judicial determination of claims of waiver subsequent to the change, resting only on the conflicting oral testimony of interested parties. The bond was drafted so as to eliminate this stock defense of sureties; and there is no warrant for permitting its insertion in this case.

Another path leads to the same conclusion: Waiver proceeds on estoppel and must be predicated on a change of position by one of the parties based upon the conduct of the other.

Where can respondents point to any act of petitioner on which respondents relied to relieve respondents from that obligation in their surety bond, which specifically provides that no waiver or release shall be binding upon petitioner, unless (1) in writing, (2) signed by duly authorized officers of petitioner and (3) specifically referring to the items so released or waived?

We respectfully submit that this Court should not permit a holding to pass without review which prevents lenders from obtaining the very protection against a stock defense of surety companies (oral waiver), which the defendants were paid to give and be bound by in this case.

V

In Reply to Respondents' Point V

Aside from what we have stated in IV above, it is apparent that respondents have abandoned any attempt to show that the evidence, which the Circuit Court of Appeals has made the basis of the requirement of a new trial, in any way "tended to show" a waiver of any provision either of the bond or the building loan agreement.

The testimony which was excluded was objected to by petitioner as "irrelevant and not proper cross examination" (R. p. 213).

Respondents now argue that whether the particular question was relevant or not, they should be granted a new trial, in order to endeavor to produce some relevant testimony on that subject (see respondents' brief, p. 25). Such a contention is clearly untenable and is answered by the many cases which require an adequate offer of proof as a basis for reversal.

As a matter of fact, respondents were not "prevented from proceeding further", as stated on page 25 of their brief. On the contrary, respondents endeavored subsequently to show conversations between Haas (superintendent of the Lefcourt organization) and Walters (a former Lefcourt employee who was then serving as plaintiff's chief engineer), which conversations related only to alleged oral waivers of interior bathroom radiators (R. pp. 394-97), and that item was disallowed by the Court on other grounds (R. p. 514).

The fact that defendants were unable in the course of over 400 pages of testimony to suggest any evidence tending to show a waiver of any specific item included in the omissions or substitutions for which damages have been allowed demonstrates the futility of the new trial which the Circuit Court of Appeals has directed.

VI

In Reply to Respondents' Point VI

The contention by respondents that there must be a new trial because petitioner did not furnish, as such, *opinion evidence* showing the difference in value between the incompleted building on December 16, 1930 and the value of such building, if it had been completed up to the mark of the contract, is, as we have already shown, contrary to the holdings in the *Trainor* and *Kidd* cases. In other words, measure of damages can be complied with and met by many *kinds* of evidence and, as we have shown, the *kinds* of evidence which petitioner offered were within and complied with the *Trainor* and *Kidd* cases.

The fallacy of respondents' argument in this case is well shown by the statement at the foot of page 11 of their brief, to the effect that (italics ours)

> "the premises as they stood on the date of the default *might have been* of a value in excess of the amount of its" (petitioner's) "mortgage."

Not only does such a contention deprive a prudent lender of the margin of safety (equity) which should always be present in mortgage loans, and not only does such contention seek to substitute the judgment of someone other than the lender as to just how much margin of safety (equity) there should be, and not only does this contention make it imposible for a lender who advances less than 100% of the value of the land and building to receive any benefit from a surety bond, but also such a contention is directly contrary to the decision of this Court in *Trainor* v. *Aetna Casualty Co.*, 290 U. S. 47, where this Court specifically stated at page 53:

> "With that conclusion we are unable to agree."

LAST POINT

The petition for writ of certiorari should be granted.

Dated, September 20, 1935.

Respectfully submitted,

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ORRIN G. JUDD,
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FILE COPY

DEC 27 19

Supreme Court of the United States

October Term, 1935

No. 270

THE PRUDENCE COMPANY, INC.

Petitioner

v.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE

BRIEF OF PETITIONER

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2 Sedgwick, Damages (9th Ed.) § 645 29

N. Y. Real Prop. Laws, Sec. 253 [3] 52

Sutherland, Damages, § 703 34

Torts Restatement (Am. L. Inst.) § 447 39

Argued by
ALFRED T. DAVISON

Supreme Court of the United States

October Term, 1935

No. 270

THE PRUDENCE COMPANY, INC.,
Petitioner,

v.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE.

BRIEF OF PETITIONER

This case is before this Court on certiorari, limited to the measure of damages, granted October 14, 1935 (R. p. 886) to review the decree (R. p. 885) of the United States Circuit Court of Appeals, Second Circuit, made June 17, 1935, which decree reversed the judgment (R. p. 61) of the United States District Court for the Southern District of New York entered June 14, 1934, for $781,694.56, in favor of petitioner as plaintiff, against the respondents as defendants, and which decree also ordered a new trial.

Opinions Below

The opinion of the District Court (R. p. 498) is reported in 7 F. Supp. 392.

The opinion of the Circuit Court of Appeals (R. p. 877) is reported in 77 F. (2d) 834.

The Action

This is an action at law by petitioner to recover from respondents damages due petitioner as obligee under the guaranty (of completion) and indemnity bond for $3,000,000 given by respondents in order to induce petitioner to advance as a building loan the sum of $6,650,000* to Central Park Properties, Inc., for the construction of, and to be secured by mortgage on, the apartment hotel known as Essex House, which is the largest apartment hotel in New York (R. p. 225).

Petitioner was the plaintiff in the District Court and is hereinafter sometimes referred to as "Prudence Company." Respondents are sometimes hereinafter referred to as "Sureties." Central Park Properties, Inc., is sometimes hereinafter referred to as "Principal."

Unless otherwise indicated, the italics in this brief are added by the authors.

The Issue

The certiorari is limited to and the question brought up for review is, the measure of damages to which petitioner is entitled as obligee under such surety bond upon its breach.

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* The entire $6,650,000 was advanced by Prudence Company, and $75,000 was repaid (R. p. 112).

The issue in this Court is mainly whether Prudence Company's damages on such breach of said surety bond should include interest lost by it on the unpaid $6,575,000 building loan (so made in reliance on such bond), between the date specified in the bond for completion of the building by the Principal and the date of its actual completion by Prudence Company, and should also include taxes and insurance premiums which Prudence Company paid during the period of completion.

Statement of the Case

The Surety Bond

Said surety bond (with respect to the issue now before this Court):

1. Guaranteed the construction and completion *not later than December 16, 1930* of the modern 40-story and basement fireproof hotel, specifically described and identified (R. p. 595) in strict accordance with the building loan agreement and with the plans and specifications therein referred to, so as to be *ready for occupancy as a modern hotel, with all equipment installed* (furniture only excluded) not later than December 16, 1930.

2. Obligated respondents as Sureties to "*fully indemnify*" Prudence Company "against any and all loss or damage by reason of failure of the Principal to • • • complete said building • • • *within the time aforesaid*" and in accordance with the plans and specifications (R. p. 596).

3. Obligated such Sureties "to make good any and every default on the part of the Principal" in performing any of the terms, covenants and conditions which the Principal had agreed to keep and perform in the building loan agreement *up to and including the completion* of and payment for said building (R. p. 596).

4. Provided that upon default by principal and/or Sureties, Prudence Company might

(1) complete in general accordance with the building loan agreement and plans and specifications (R. p. 602); and

(2) "do all other acts and things deemed necessary or proper by the Obligee" (Prudence Company) "to complete and equip said building" (R. p. 602),

and also

5. Provided that the sureties should repay Prudence Company "any and all sums of money paid by the Obligee" (Prudence Company) "for the purposes" just enumerated "with interest" (R. p. 602).

The size of the surety bond ($3,000,000) indicates that the parties contemplated and envisaged very serious and large losses to Prudence Company in case the conditions of the bond were not fully complied with.

The Building Loan

Prudence Company was an investment corporation under the Banking Law of New York, engaged in making building loans (on as many as 120 buildings at a time—R. p. 130—).

Respondents are paid sureties.

The Sureties' Principal (Central Park Properties, Inc.) wanted a mortgage loan on this apartment hotel *to be* erected, and desired advances of that mortgage loan before completion—a building loan.

The detailed plans and detailed specifications of what such building was to be were prepared, submitted to Prudence Company, modified to meet its requirements, approved and identified (R. pp. 67-68, 157).

The documents binding the relation of the parties are:

1. the building loan agreement (Exh. 1) between the Principal (Central Park Properties, Inc.) as borrower, and Prudence Company as lender (R. p. 567);

2. the surety bond (Exh. 2) on which this action is predicated, which expressly incorporated the building loan agreement as part thereof (R. pp. 592-93).

In addition to obligating the Principal to erect the building within the time specified, the building loan agreement also obligated the Principal to execute and deliver to Prudence Company a bond and mortgage and provided for many of the terms of such bond and mortgage, and also (R. p. 568) obligated the Principal:

> "to perform and comply with all and every of the covenants, terms and conditions herein *and in said bond and mortgage contained.*"

Prudence Company was also furnished with the personal guaranty of A. E. Lefcourt, President of the Principal, Central Park Properties, Inc., guaranteeing completion of the building and punctual payment of full principal and interest of the bond and mortgage (but not promising indemnity). It is to be noted, however, that this bond by its terms expired and became null and void on the issuance of a certificate of occupancy (R. p. 681). The certificate of occupancy was issued October 3, 1930 (R. p. 879), "but this was not a certificate of completion" (R. pp. 494, 879); and the building had not then been completed, nor the full amount of the building loan advanced.

The full amount of the building loan was advanced and there is now no dispute that all such advances were made in pursuance of the building loan agreement.

$75,000 was paid on account of the loan, leaving as the total unpaid amount of the mortgage loan advanced $6,575,000 (R. p. 112).

Respondents sought to ground a defense on the nature of this payment of $75,000, but the District Court and the Circuit Court of Appeals definitely found against the respondents, both on the law and facts with respect to this defense (R. pp. 514, 879-80).

Defaults

Defaults under the surety bond (and this includes the building loan agreement) are conceded.

Concededly,

1. the building was not completed and ready for occupancy on December 16, 1930;*

2. the building was not constructed in accordance with the plans and specifications and the building loan agreement;†

3. Large amounts of money remained to be expended to bring the building up to the mark of the contract.

The word "concededly" is used advisedly. We need refer only to the verified answers (R. pp. 39, 50, 51) marked in evidence at the trial (R. pp. 249-250) and to the statement of defendants' counsel upon the trial (R. p. 334). In subdivision marked "Twelfth" of the verified amended answer, respondents themselves allege (R. p. 50):

> "TWELFTH: That on the 5th day of December, 1930, the building was in such condition that it would have required a sum in excess of $170,000 to complete the same and make it ready for occupancy, and there were omissions of labor and materials from and substitutions of inferior materials in said building amounting in value to a sum in excess of $230,000."

This is a repetition *verbatim* of subdivision marked "Fourteenth" in the original verified answer (R. p. 39).

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* The date of actual completion was October 1, 1931 (R. p. 111).

† The record shows that after Prudence Company had accepted the loan and made its first advance of $3,250,000 the plans and specifications were secretly, deliberately, intentionally and materially changed (R. pp. 192, 345), and the specifications rewritten by the Principal (R. pp. 371-373). Many items were omitted and many substitutions of inferior materials made, in respects which the proof shows detracted from the appearance, value and efficient operation of the building (R. pp. 161, 182, 220, 434-35, 471-72, 482-83).

For a third repetition of the concession and admission, see subdivision marked "Twentieth" of the amended answer of both defendants (R. p. 51).

The District Court's findings of fact with respect to such defaults were not questioned by the Circuit Court of Appeals.

Completion by Prudence Company

Prudence Company completed the building after notices to the respondents giving opportunity to them to complete (R. pp. 730, 738) and after their failure to do so. During the course of such completion Prudence Company expended large sums of money for labor and materials and also for taxes and insurance premiums on this building.

Prudence Company, in accordance with its rights under the bond (R. pp. 602-603), did not, in certain instances, go to the expense of remedying substantial departures from the plans and specifications, but proved the cost of supplying the items omitted, and also proved the difference in value between the inferior materials substituted and the materials called for by the plans and specifications.

Foreclosure and Deficiency Judgment

Before completing the building Prudence Company caused its mortgage to be foreclosed in the name of its representative and nominee, James T. Harrigan, and on the foreclosure sale the property was bought in by said James T. Harrigan, who "represented and was the nominee of" Prudence Company. In such foreclosure action

a deficiency judgment was entered April 30, 1931 for $716,215.02,* no part of which has been collected.

The amount of such deficiency judgment with interest from April 30, 1931 is more than the amount of the judgment obtained by Prudence Company in this case.

Defenses

All the defenses set up by the Sureties (and there were ten separate defenses originally) were either stricken out by the District Court on motions before trial (see orders and opinion of Judge Bondy, R. pp. 523, 536, 541—2 F. Supp. 454—) or were held not proved at the trial (see opinion of trial Court—Judge Galston—R. p. 498); and the Circuit Court of Appeals was in accord with such dispositions thereof except only with respect to one aspect of the partial defense of oral waiver, fully discussed in the briefs on the application for certiorari, and mentioned later in this brief (pp. 13-14n., 56).

The Trial, Verdict and Judgment Thereon

The case was tried, pursuant to written stipulation (R. p. 65), before a jury of one, and it was agreed that both parties should be deemed to have moved at the conclusion of the trial for a directed verdict without reservation of any right to have any issue or issues submitted to the jury.

Petitioner proved three items of damage, viz.:

(1) actual payments made in completing the building, including taxes and insurance premiums paid by petitioner during the period of completion;

* All the facts with reference to the foreclosure by James T. Harrigan, as representative of and nominee of Prudence Company are set forth in subdivision marked "XXXIX" of the complaint (R. pp. 19-20), which was offered in evidence by the respondents on the trial (R. p. 314).

(2) estimated cost of supplying omissions, and difference in value by reason of inferior substitutions,

and

(3) interest which petitioner lost on its capital investment between the time the building should have been completed and the time it was actually completed.*

Pursuant to the stipulation the trial Court, after the trial, directed a verdict in favor of Prudence Company for $777,934.54 (R. pp. 63, 515) which, with interest from the date of the verdict to the date of the entry of judgment, made up the amount of the judgment entered June 14, 1934, namely $781,694.56 (R. pp. 61-62).

Such judgment includes three types of damages to Prudence Company (R. pp. 515, 516, 63):

I. Amount expended by Prudence Company in the completion of the building (including insurance premiums in the sum of $1,640.87 and taxes in the sum of $57,120)	$209,454.85	
Interest thereon to May 15, 1934	33,765.93	$243,220.78

* In addition to proving that the cost of completion was reasonable (R. p. 233 and Exhibit 84, R. p. 758) petitioner proved that the time taken for completion was reasonable. Not only does reasonable cost of completion necessarily include the fact that the time required for completion was entirely reasonable, but also, inasmuch as the payrolls included in the cost of completion (Exhibit 84, R. p. 761) necessarily involved the question of time, the testimony offered by petitioner that such

II. Amount representing estimated cost of supplying omissions of materials called for by plans and specifications	$143,842.28	
Interest thereon from December 16, 1930, to May 15, 1934	29,426.76	$173,269.04
III. Amount of interest lost by Prudence Company by reason of failure to complete on or before December 16, 1930, being interest on $6,575,000—net amount advanced on building loan mortgage—from December 16, 1930, to date of completion, October 1, 1931 (as alleged in subdivision XXXVII (3) of the complaint)	312,357.53	
Interest thereon from October 1, 1931, to May 15, 1934	49,087.19	361,444.72
Total amount of verdict		$777,934.54

payrolls were necessary and reasonable, establishes that the time taken was reasonable.

This appears, moreover, from the fact that Mr. Lukach, who was in charge of completion for Prudence Company, was at the building every day and all of every day until October 1, 1931, the date of completion by petitioner (R. p. 237).

While it was not incumbent upon petitioner to perform the obligation of the bond which the respondents had breached—since completion was an obligation of the sureties—we mention these facts because the sureties have previously based an argument on the contention that there was no evidence of what constituted a reasonable time for completion.

Interest thereon from May 15, 1934 (date of direction of verdict) to June 14, 1934 (date of entry of judgment on the verdict)	3,760.02
Total amount of judgment	$781,694.86

The Decision of the Circuit Court of Appeals

The grounds upon which the Circuit Court of Appeals reversed are:

1. that the measure of damages on the breach of this guaranty of completion and indemnity does not permit recovery of

(a) the interest which Prudence Company lost on the money it had actually advanced on the mortgage loan on the building (which was not completed) between the date it should have been completed (December 16, 1930) and the date of the actual completion by Prudence Company (October 1, 1931); or

(b) taxes ($57,120) and insurance premiums ($1,640.87) which Prudence Company was required to pay for the period between the date the building should have been completed and the date it was completed; and

2. the exclusion of evidence described by that Court as "tending to show," if proper foundation had been laid, a parol waiver or release of requirements of the building loan agreement and plans and specifications.

But for the one aspect of the partial defense of waiver with respect to which the Circuit Court of Appeals stated there was evidence "tending to show" parol waiver, judgment could be directed for the amount of damages to which Prudence Company is entitled.*

Thus the rule of damages which the Circuit Court of Appeals has laid down is limited to

> (1) cost of labor and materials required for completion, and
>
> (2) loss due to omissions and items of inferior substitution,

the opinion stating (R. p. 884):

> "Upon a new trial, which must be had, in establishing appellee's damages, the rule of cost of completion will be the guide. Evidence of experts as to the difference in value showing cost of completion, evidence of actual cost, and experts' testimony as to cost of completion, may be received.

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* While this certiorari is limited to the measure of damages, no statement of the case would be complete without calling attention to the fact in this connection:

> (1) that the bond provided that *any waiver or release* by Prudence Company of any default or omission by Principal and/or Surety in complying with the building loan agreement or plans and specifications *must, in order to be binding upon Prudence Company, be* (1) *in writing,* (2) *signed by duly authorized officers of Prudence Company, and* (3) *specify* "the item or items specifically so released" (R. p. 604);
>
> (2) that the provision just quoted was contained *not* in the building loan agreement but in the bond, and there is no claim that the parties *to the bond* ever varied its provisions;
>
> (3) that the only evidence which the Circuit Court of Appeals referred to as "tending to show" parol waiver

> "Loss due to items of inferior substitution unless effectively consented to by the appellee may also be recovered."

The Circuit Court of Appeals also stated (R. p. 881):

> "The true measure of damages to this appellee, is the extent to which its security was impaired by the failure to complete in accordance with the plans and specifications."

Clearly, as we interpret such a statement, the loss of interest during the time necessary to complete, together with the taxes and insurance premiums which must be paid, constitute part of the measure of impairment of the security which a completed building was intended to afford.

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was a vague question (R. p. 213) put to a former architect of the Principal, on cross examination (having no relation to the witness' *direct* testimony, and excluded, among other reasons, as being improper cross examination), with respect to a conversation had at a time when he represented none of the parties to the litigation,

(4) that the Circuit Court of Appeals held the exclusion of such evidence was prejudicial error only *"if"* Prudence Company's "president had authority to waive the requirement of written waiver and consent" (R. p. 883); but that there was no proof that the Prudence Company's President had such authority; and, on the contrary, the proof was that all changes were actually passed upon by a committee (R. pp. 134, 136) of which the President was not a member;

and

(5) that *neither the evidence excluded nor any evidence offered at the trial purported to relate to the waiver of any specific item of the plans and specifications.*

Specifications of Error Intended to Be Urged

The Circuit Court of Appeals erred:

1. In holding that none of the items of interest, taxes and insurance, for the period between the date fixed for completion of the building and the date of actual completion, was recoverable under the applicable rule of measure of damages.

2. In holding that interest lost on the loan, and taxes and insurance paid, for the period between the date fixed for completion of the building and the date of actual completion, were not within the contemplation of the parties at the time of the execution and delivery of the surety bond.

3. In holding that there is no evidence to support the finding of fact by the trial Court that interest, taxes and insurance were each within the contemplation of the parties.

4. In holding that, in the absence of express contract to pay the interest lost on the mortgage loan, interest as damages, even though within the contemplation of the parties, cannot be recovered under the surety bond, and that there was no evidence to support the District Court's finding on this point.

5. In holding that there is no condition, express or implied, in the surety bond, respecting payment of interest on the loan, taxes or insurance, and that no liability exists therefor, and that none of them are within the undertaking of the surety companies.

6. In holding that, under the decision of the Court of Appeals of the State of New York in *Kidd* v. *McCormick*, 83 N. Y. 391, and the decision of this Court in *Trainor Co.* v. *Aetna Casualty Co.*, 290 U. S. 47, interest, taxes and insurance are not recoverable as damages on the breach of the surety bond.

7. In holding that the true measure of damages to the Prudence Company is the extent to which its security was impaired by the failure to complete the building in accordance with the plans and specifications.

8. In holding that any court can pass upon the margin or nature of security to which the Prudence Company is entitled under the building loan agreement and surety bond in this case.

9. In holding that the Prudence Company was not entitled on December 16, 1930, to a completed building, which could be immediately rented and availed of as a source of income, out of which to pay interest, taxes and insurance.

10. In holding that the Prudence Company cannot recover interest as damages by reason of the failure to complete said building on December 16, 1930, in the absence of proof showing loss of rent during the period of incompletion.

11. In holding that the parties did not contemplate at the time of the building loan agreement that the building would rent and was capable of being rented for more than enough to pay interest, taxes and carrying charges.

12. In holding that interest, taxes and insurance should not be included as damages under a rule of measure of damages based upon the difference between the value of the building on December 16, 1930, as the work had progressed, and the value it would have had on that day, if completed strictly in accordance with the plans and specifications.

Argument

Outline of Points to Be Argued

Foreword.

POINT I.—Interest, taxes and insurance premiums as items of loss and damage to petitioner are recoverable as part of the damages within the contemplation of the parties.

1. **The applicable decisions of this Court and of the New York Court of Appeals justify and require the allowance of interest, taxes and insurance as part of the damages caused by the failure to complete the building at the time guaranteed.**
2. **The facts and circumstances under which this surety bond was given, as well as the provisions therein contained, specifically show that interest, taxes and insurance premiums were within the contemplation of the parties as items of damage in case of breach.**
3. **On the principle that interest bears the same relation to money as rent does to land, interest is clearly recoverable as an item of damage.**
4. **The trial Court found as a fact that interest, taxes and insurance were within the contemplation of the parties.**

5. Interest is recognized as part of the measure of damages for breach of contract, where loss of such interest was within the contemplation of the parties.

POINT II.—In addition to being within the contemplation of the parties, interest, taxes and insurance premiums are recoverable because necessarily included in the general rules of damages applicable to bonds guaranteeing completion.

POINT III.—The provisions of the surety bond in this case specifically obligated the surety in express terms to pay interest on the loan, and taxes and insurance on the mortgaged property, until the date of actual completion of the building in accordance with the plans and specifications.

1. As to interest.
2. As to insurance.
3. As to taxes.

POINT IV.—The measure of damages adopted by the trial Court was supported by proper evidence, and conformed with all legal requirements.

CONCLUSION.—Both sides having moved for the direction of a verdict, there is no restriction on the power of this Court to direct such judgment as the Circuit Court of Appeals should have directed: viz., either (1) affirming the judgment of the District Court, because the exclusion of so-called evidence "tending to show" parol waiver was not such of itself as to require a new trial, or (2) if a new trial is to be had, directing that the issue on such new trial be limited to the question of the effectiveness of any alleged waiver of omissions or substitutions.

Foreword

From whatever angle the facts in this case are considered, Prudence Company's capital investment is the central feature.

The protection of such capital investment was the motivating cause of the surety bond.

Prudence Company required security and the parties agreed that such security would be a specific building, completed and ready for occupancy, with all equipment installed, not later than a fixed and certain date—December 16, 1930.

Obviously, there would not be adequate security until the building was completed and ready for occupancy.

Until that time, this surety bond for $3,000,000 filled the gap and was the basis on which Prudence Company not only agreed to, but did actually, make the advances of $6,650,000.

POINT I

Interest, taxes and insurance premiums as items of loss and damage to petitioner are recoverable as part of the damages within the contemplation of the parties.

Ever since *Hadley* v. *Baxendale*, 9 Exch. 341, 354, 356 (1854), the law has been well settled and unquestioned that damages on a breach of contract

> "should be * * * such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."

Hadley v. *Baxendale* (*supra*) was expressly approved in *Howard* v. *Stillwell & Bierce Mfg. Co.*, 139 U. S. 199, 207, and *Booth* v. *Spuyten Duyvil Rolling Mill Co.*, 60 N. Y. 487, 492.

Not only the decisions with respect to surety bonds, but an independent consideration of the nature and purposes of a surety bond given to a mortgagee—and particularly of the bond here involved—show that the damages allowed by the trial Court (including interest lost and taxes and insurance premiums paid by petitioner), fall within the reasonable contemplation of the parties, and are justified by the rule of *Hadley* v. *Baxendale*.

1

The applicable decisions of this Court and of the New York Court of Appeals justify and require the allowance of interest, taxes and insurance as part of the damages caused by the failure to complete the building at the time guaranteed.

Clearly, as we submit, this Court has ruled in *Trainor Co.* v. *Aetna Casualty Co.*, 290 U. S. 47, that interest, taxes and insurance are within the damages contemplated by parties to such a surety bond as is the subject of this action. In that case, there was a completion bond given by the Aetna Casualty Co. to Trainor, the mortgagee, which guaranteed that a building and certain improvements would be erected in accordance with plans and specifications upon each of 52 lots upon which Trainor had his mortgage, within ten months from the date thereof.

The trial Court found that on the date fixed for the completion of the buildings and improvements, 28 houses

had not been fully completed, but held that Trainor was entitled to merely nominal damages against the surety, because of the further finding that, although a mortgage prior to Trainor's had since been foreclosed, the value of the property with the uncompleted buildings at the time of default exceeded the sum of his mortgage and all prior liens.

On appeal from the affirmance by the Circuit Court of Appeals, this Court reversed and unanimously held (Mr. Justice SUTHERLAND, p. 55):

> "It is no answer to say that the value of the property immediately after the default exceeded the sum of the mortgage together with all prior liens. Petitioner was then without remedy against the property because its mortgage was not in default. It was, therefore, obliged to sit by and await the action of others over which it had no control. In the meantime, *the uncompleted buildings necessarily lay unrented, subject to expense in the way of taxes, insurance, accumulating interest, etc.*, deteriorating in quality and steadily declining in value. Petitioner is entitled to be put in as good position *in respect of its debt* as it would have occupied if the buildings had been completed in accordance with the terms of the undertaking; and this can be done here only by giving it the amount of the difference between the value of the unfinished buildings and their value as it would have been if completed in accordance with the agreement—see Kidd *v.* McCormick, supra, p. 398—but exceeding neither the amount due on its debt nor the amount of the bond."

Kidd v. *McCormick*, 83 N. Y. 391 (cited with approval in (*Trainor* v. *Aetna*), also clearly recognizes that the dam-

ages which a mortgagee suffers by reason of failure to complete a building on the date called for, include the loss of interest on his own investment during the period of completion, and the taxes and insurance premiums which must be paid—and in this case *were* paid by Prudence Company—during that period, the default in completion having made it impossible to produce any income from the mortgaged property to keep down such carrying charges. In the *Kidd* case, plaintiff conveyed certain property to the defendants, taking back purchase money mortgages which be subordinated to new first mortgages. Defendants undertook to erect houses on each of the lots, and plaintiff agreed to aid by temporary loans. In order to induce the plaintiff to so subordinate and to make such loans, it was agreed that a special fund should be provided out of the proceeds of the first mortgages, to be paid to plaintiff when the buildings were completed and ready for occupancy. Defendants defaulted in completing; plaintiff foreclosed, bought in the property, and completed the buildings; and the question was raised concerning the rights of the plaintiff as second mortgagee in such special fund so deposited for the completion of the buildings.

Judgment went for the plaintiff (second mortgagee) in the sum of $2,250 with interest, which the Referee found to be the difference between the value of the uncompleted houses and the value they would have had if finished on the agreed date; the record on appeal therein (fols. 15, 84, 259, 268), and the concessions of the plaintiff himself (Brief in Court of Appeals, p. 6) show that the amount recovered ($2,250) was more than the plaintiff's actual payments for labor and materials used in completing the buildings.

In affirming this judgment, the New York Court of Appeals said (p. 395):

> "• • • Clearly he" (plaintiff, second mortgagee) "is entitled to have from the McCormicks as much as will put him in as good plight as he would have been had the houses been finished."

and at page 398:

> "The plaintiff was entitled on the 1st of September, 1877, that there should be finished houses, *rentable,* and so, *productive of income with which* to keep down *interest on the mortgages on the lots, the taxes thereon, and insurance premiums.* He could not, on that day, had he been let into immediate possession and control, by any expenditure of money or energy, have completed them at once; nor, in the nature of things, could he have supplied the lack of the completed houses by a purchase in the market. *The work needed to complete was one of time; and while the time was running, interest was running also, taxes were levied, insurance was to be kept up, and the premises were yielding no rent. It is plain that to repay him just what he expended to finish the buildings would not make him whole; for he had to* pay, besides the cost of building, interest to Granniss" (first mortgagee) "and *lose interest on his own mortgages, and pay taxes and premiums.*"

In *Kidd* v. *McCormick* there was no surety bond with the many and specific obligations which are in the bond in this case. That case, for that reason, is even stronger authority for the inclusion of interest, taxes and insurance under an express bond of guaranty and indemnity, and indicates what subsequent to that case must have been plain to sureties binding that same relationship.

The above quotation from *Kidd* v. *McCormick* squarely disposes of the argument sought to be made by respondents in the Circuit Court of Appeals and also on the application for certiorari here, to the effect that the *Trainor* and *Kidd* cases are distinguished by the fact that the plaintiffs therein were junior mortgagees. As the Court of Appeals stated in *Kidd* v. *McCormick,* even if the junior mortgagee in that case had been let into immediate possession and control the work needed to complete was one of time, and while the time was running, interest and taxes and insurance premiums were also running. The Court thus held that the junior mortgagee's loss of interest on his own mortgage was part of his damage. It follows, therefore, that the rule of damages, which must be compensatory, is the same whether the obligee be a first mortgagee or a third mortgagee.

For the same reason that this Court and the New York Court of Appeals were unable to think and speak of damages sustained by a mortgagee by reason of the non-completion of a building which had been guaranteed to be erected, except in terms of interest, taxes and insurance premiums as part of such damages, so also the parties to this action must have contemplated, and certainly are to be deemed to have contemplated, that interest, taxes and insurance were part of the damages to be sustained on the breach of the contract in this case.

If interest, taxes and insurance be not included in petitioner's damages, then the rights recognized by this Court in *Trainor Co.* v. *Aetna Casualty Co.,* that

> "Petitioner is entitled to be put in as good position in respect of its debt as it would have occupied if the buildings had been completed in accordance with the terms of the undertaking";

and by the New York Court of Appeals in *Kidd* v. *McCormick*, that

> "he" (plaintiff, second mortgagee) "is entitled to have from the McCormicks as much as will put him in as good plight as he would have been had the houses been finished"

are not fulfilled and petitioner is deprived of a part of the damages actually sustained.

No court has ever questioned the language or the justice of the statement of Chief Judge FOLGER in *Kidd* v. *McCormick*:

> "• • • *It is plain that to repay him just what he expended to finish the buildings would not make him whole,*"

and yet that is just what the Circuit Court of Appeals has done in this case, because it has limited Prudence Company in this case to a recovery of what it expended plus only the expense of bringing the building up to the mark of the contract.

2

The facts and circumstances under which this surety bond was given, as well as the provisions therein contained, specifically show that interest, taxes and insurance premiums were within the contemplation of the parties as items of damage in case of breach.

A

The surety bond guaranteed that the building would be

> "*ready for occupancy* as a modern hotel *not later than the 16th day of December, 1930*, together with

> all equipment customary in a building of the type provided for in said building loan agreement, installed *not later than the said 16th day of December, 1930* • • •'' (R. p. 595)

and the bond is replete with provisions emphasizing the obligation to complete the building *''within the time aforesaid''* (R. pp. 596, 597, 598).

Why the above provision, including "ready for occupancy as a modern hotel not later than the 16th day of December, 1930," "with all equipment • • • installed," if not that the respondents were insuring that from and after December 16, 1930, Prudence Company, upon resorting to the building as security for its loan, would have an immediate source of income with which to pay interest, taxes and insurance, and other carrying charges from and after December 16, 1930?

Buildings are given as security for mortgage investments—and completed buildings are required—in order that in case of default, they may be resorted to as sources of income with which to pay the interest which the borrower has defaulted in paying, and with which to pay the principal when such buildings can be sold.

An uncompleted building is of no use to anyone, and consequently is no security.

Therefore, pending the completion of the building the surety bond was to give Prudence Company the security which the building after completion would furnish—that is, an assurance of a completed structure capable of producing revenue with which to meet not only the interest on the amount advanced, but the carrying charges (including taxes and insurance) on the property which was to be security for the loan.

The difference to Prudence Company between a complete and incomplete building on the date of default was as inevitably the loss of return on its money pending completion as the expense involved in bringing the building to completion. Its money was as idle meanwhile as was the building. And the idleness of the building, within universal contemplation of the parties in such a relationship, was the cause of the idleness of the money.

The above aspect of the relation between the obligation of the parties to this action and the scope of the damages contemplated in case of breach is expressly sanctioned in that part of the opinion in *Kidd* v. *McCormick* which states (p. 398):

> "The plaintiff was entitled on the first of September, 1877, that there should be finished houses, rentable, and so, productive of income with which to keep down interest on the mortgages on the lots, the taxes thereon, and insurance premiums."

B

The surety bond in this case is more than a guarantee of completion. It is also a bond for indemnity.

Among the provisions for indemnity in the surety bond are (R. p. 596):

> "AND IF the said Surety shall fully *indemnify* and save harmless said Obligee," (this petitioner) "its successors and assigns, *from and against any and all loss or damage by reason of failure of the Principal* to construct, fully pay for and complete said building and install, supply and fully pay for such equipment *within the time aforesaid* and as provided for in said building loan agreement and plans and specifications; AND IF said Surety shall

> make good any and every default on the part of the Principal in constructing, paying for and completing said building and supplying, installing and paying for equipment *as aforesaid* * * *."

The Court will note the time element in the provision just quoted.

How can there be indemnity if the petitioner is not placed in just as good a position as if the building had been completed on December 16, 1930, and given the full margin of protection for which it bargained?

How can petitioner's security be preserved unless tax liens accruing against it during the period of completion, and insurance premiums necessary to protect the building during its completion, are paid?

It is impossible to consider the loss of any mortgagee obligee under a bond such as in this case without taking into account the interest lost and the taxes and insurance required to be paid.

If this building had been completed on December 16th, 1930, the petitioner could have immediately resorted to the building as the source of income out of which interest on its mortgage investment could be derived, and taxes and insurance premiums paid.

Petitioner, having lost interest on its mortgage investment from December 16, 1930, until the building was completed, is entitled to look to the defendants for reimbursement for such interest, and for taxes and insurance premiums paid, as items of loss against which defendants indemnified it.

3

On the principle that interest bears the same relation to money as rent does to land, interest is clearly recoverable as an item of damage.

> "* * * In this country interest is the natural growth, or incident, of money, and bears the same relation to it that rent does to land."

Thus spoke Judge O'Brien in *Woerz* v. *Schumacher,* 161 N. Y. 530, 536.

It is well settled that the owner of the land on which a building has been guaranteed to be completed within a certain time, is entitled to the rental value of the land and building during the delay in completion, as a part of the damages flowing directly from the failure to complete the building.

White v. *McLaren,* 151 Mass. 553;
U. S. Fidelity & Guaranty Co. v. *Parsons,* 147 Miss. 335, 53 A. L. R. 88;
Noonan v. *Independence Indemnity Co.,* 328 Mo. 706;
Hexter v. *Knox,* 63 N. Y. 561;
Lord v. *Comstock,* 20 Jones & S. (N. Y.) 548;
Donlan v. *Trust Co.,* 139 No. Car. 212;
Somerby v. *Tappan,* Wright (Ohio) 229, 231; same case on second trial, *id.* 570 (1833);
2 Joyce, Damages, Section 1388;
2 Sedgwick, Damages (9th Ed.) § 645.

There is no escape from the analogy between a mortgagee, whose capital investment is tied up in this land and

building, and the owner of the land and building. In either case failure to complete means a loss—to the owner, a loss of rent, to the mortgagee (who must take over the property), a loss of interest and carrying charges, for which the building, if it had been completed, would have been security—.

It follows that the holder of a *mortgage,* representing a *money interest* in land, is entitled to the interest, corresponding to the rent of an owner, which he loses, during the delay in completion of a building guaranteed to be finished at a specified time.

The Circuit Court of Appeals misconceived the nature of the right to interest, and the relevance of proof of rental value, when it stated:

> "Since the complaint does not plead and no proof has been received showing loss of rent during the period of incompletion, we need not decide whether or not this appellee might have had a loss of profits because of failure to have a completed building after its entry and possession of the premises" (R. p. 884).

Prudence Company, recognizing that the guaranty ran to it as mortgagee rather than as owner, has not asked for the profits which would have resulted from recovery of rents. The defendants have never disputed that rental value would be greater than the interest and carrying charges which Prudence Company was allowed; and to do so would have been inconsistent with their contention (entirely erroneous) that the value of the building in its uncompleted state was sufficient to protect Prudence Company.

The parties obviously contemplated when the building loan agreement and surety bond were executed, that

the building, when erected, would rent for more than enough to pay interest on the mortgage, and taxes, insurance premiums and other carrying charges. Otherwise, (1) Central Properties would never have undertaken to erect the building, (2) the Prudence Company would not have agreed to lend money on its security for its erection, and (3) the holder and guarantor of the prior mortgage on the premises would not have consented to subordinate such mortgage of $1,400,000 to the mortgage being advanced by Prudence Company, or to lend an additional $600,000 on the completed building (R. pp. 584-85). The Principal having been a party to all these three transactions, its Sureties, respondents here, cannot dispute the purposes and objects so obviously in the minds of the parties, and therefore contemplated by them.

Surely, no court can properly assume that the rental value of a modern apartment hotel fronting on Central Park South in New York City would not, in 1931, equal the interest on its first mortgage and taxes and insurance premiums, much less use such assumption as the basis for reversing an item of damage allowed by the trial Court.

4

The trial Court found as a fact that interest, taxes and insurance were within the contemplation of the parties.

The question of what damages were contemplated by the parties at the time the contract was made, is a question of fact. In *Hadley* v. *Baxendale,* 9 Exch. 341, the rule of damages was discussed in terms of the charge to be given to the jury. Other cases likewise treat the question as one for the jury.

Delafield v. *Armsby Co.*, 131 App. Div. 572, 586, aff'd, 199 N. Y. 518;
Holt Mfg. Co. v. *Thornton*, 136 Cal. 232, 68 Pac. 708;
Macleod v. *National Surety Co.*, 133 Minn. 351, 355;
Cf. Sawdon v. *Andrew*, 30 L. T. (n. s.) 23.

The trial Court, in including interest, taxes and insurance in the measure of damages, therefore decided a question of fact as to what damages were contemplated by the parties.

In reversing that finding, the Circuit Court of Appeals violated the well-recognized rule that where both parties have moved for the direction of a verdict, they are concluded by the Court's findings on all issues of fact, and the decision is not open to review if there be any evidence to support it.

Beuttell v. *Magone*, 157 U. S. 154;
Clapper v. *Gamble*, 28 F. (2d) 755, 758 (C. C. A. 8);
American Mercantile Corp. v. *Spielberg*, 262 Fed. 492 (C. C. A. 2);
Williams v. *Vreeland*, 250 U. S. 295, 298.

The documents themselves,—even the size of the surety bond ($3,000,000),—taken with the express provisions of the surety bond guaranteeing the completion of the building "ready for occupancy as a modern hotel not later than the 16th day of December, 1930," and that too "with all equipment installed," as well as the circumstances under which the loan was made by Prudence Company as an investment company under the Banking Law of New York (therefore dependent upon interest), are all facts constituting evidence amply supporting the finding of the trial Court.

5

Interest is recognized as part of the measure of damages for breach of contract, where loss of such interest was within the contemplation of the parties.

There is nothing novel in Prudence Company's claim to interest as a separate item of damage.

A clear example of interest being treated as an independent item of damage is the case of *United States* v. *New York,* 160 U. S. 598, 621, where interest paid by the State of New York on money borrowed to equip troops for the Civil War was allowed as an item of "costs, charges, and expenses properly incurred" for the defense of the United States, although if it were a claim for "interest as such" (p. 624) it could not have been recovered as against the United States. *Cf. Wilbur* v. *United States,* 284 U. S. 231.

The doctrine of *Hadley* v. *Baxendale* has also been applied to allow the recovery of interest on an independent contract. An instance is found in *Meyer* v. *Haven,* 70 App. Div. 529. That case involved a counterclaim by Haven, who had contracted to build shops for a railroad company, for damages caused by Meyer's delay in performing a subcontract for the structural iron work. This delay prevented Haven from completing his own contract with the railroad company on time, and under the terms of that contract delayed his receipt of progress payments, depriving him of the use of $27,800 from December 12, 1892 until June 25, 1893. The Court held that the interest so lost, amounting to $834, was "an item of loss" which "can be traced directly to the plaintiffs' (Meyer's) breach of

the contract" (p. 536), and that, since the terms of the main contract were known to Meyer (and the terms of the building loan agreement in this case were admittedly known to the sureties—R. p. 595), such interest was rightly included in the plaintiff's damages. (See also *Gordon* v. *Curtis Bros.*, 119 Ore. 55, 66.)

In the following additional cases, damages for delay in performing a contract were similarly held to be measured by the interest lost on the sum invested by plaintiff:

Wood v. *Joliet Gaslight Co.*, 111 Fed. 463 (C. C. A. 7);

DeFord v. *Maryland Steel Co.*, 113 Fed. 72 (C. C. A. 4);

American Bridge Co. v. *Camden Interstate Ry. Co.*, 135 Fed. 323, 330-31 (C. C. A. 4);

N. Y. etc. Mining Co. v. *Fraser*, 130 U. S. 611, 622;

See *Sutherland, Damages*, § 703.

In the *Wood* case cited above, the damages were for delay in completing a gas holder, which was required by the plaintiff only during the months of December and January; because it was not completed until the end of January, it was useless and plaintiff's investment in it was idle, until the following December. The Court stated (111 Fed. at 465-66):

> "No evidence was introduced respecting damages, other than that the holder constructed was useless to the defendant-in-error except during the months of December and January; • • • We think the first fact, viz.—that the holder was useless except during the months of December and January—discloses in law a definite measure of damage.

"The amount allowed by the Circuit Court is within a few dollars of a year's interest at five per cent., (the legal rate in Illinois), upon the contract money already paid and the amount invested in the land upon which the holder was erected. * * *

"It seems plain to us that the defendant-in-error was entitled to the loss it suffered by reason of the plaintiffs-in-error's default. In the absence of special damages, such a loss seems correctly measured by the investment tied up on account of the breach. * * * The rule we have adopted is in our opinion sufficiently supported in the case of *Mining Syndicate* v. *Fraser,* 130 U. S. 611, 9 Sup. Ct. 665, 32 L. Ed. 1031."

So, also, in computing damages for breach of an agreement to make a loan, the additional interest paid or payable on the placement of the loan with another lender is an element of damages under the rule of *Hadley* v. *Baxendale,* even though the entire principal of the loan is not a proper measure of recovery. *South African Territories, Ltd.* v. *Wallington,* [1897] 1 Q. B. 692; *Lloyd Investment Co.* v. *Illinois Surety Co.,* 164 Wis. 282, 286, 288.

Perhaps even closer in point is *Macleod* v. *National Surety Company,* 133 Minn. 351. There the suit was by the principal contractor for construction of a school building, on the bond of a sub-contractor, whose delay in furnishing structural ironwork had prevented plaintiff from fulfilling his contract at the agreed time. This delay had caused loss of interest on the final installment of the contract price from the date fixed for completion to the date when the sub-contractor completed his portion of the work. The Court held that the jury were justified in finding that part of the damages "naturally and necessarily resulting from the delay in delivering the material upon the premises" included "interest to the amount of $125 upon an

installment of the contract price to be paid plaintiff on November 1, 1912, the date fixed for the completion of the building and which payment was withheld because of the fact that the building was not completed, such completion being prevented by the default of the Avery Co." (defendant's principal) (133 Minn. at 354).

The above cases show that the Circuit of Appeals was under a misapprehension as to the nature of the right to interest when it stated (R. p. 884):

> "* * * In the absence of express contract to pay the interest, interest as damages cannot be recovered apart from the principal of the debt. *Holden* v. *Trust Co.*, 100 U. S. 72; *Brewster* v. *Wakefield*, 22 How. 118; *Hamilton* v. *Van Rensselaer*, 43 N. Y. 244; *O'Brien* v. *Young*, 95 N. Y. 428."

The cases cited by the Circuit Court of Appeals are cases which apply only the rules (1) that interest after maturity (being awarded as damages and not by virtue of contract) is calculated at the legal rate instead of the contract rate, and (2) that a guaranty of interest up to a certain date cannot be construed as a promise to pay interest beyond that certain date. Rule (1) does not forbid Prudence Company's recovery of interest here, whether as damages or as part of the express obligations of the bond. As for rule (2), it would, if applicable, forbid only interest *after* completion. The surety bond in this case was a bond of guaranty and indemnity "up to and including the completion of" the building (R. pp. 596-97), which was completed on October 1, 1931. No interest beyond that date has been asked or recovered as damages. Nothing in the cases cited by the Circuit Court of Appeals, therefore, prevents the recovery of the interest which was lost as a result of the delay in completing the building.

POINT II

In addition to being within the contemplation of the parties, interest, taxes and insurance premiums are recoverable because necessarily included in the general rules of damages applicable to bonds guaranteeing completion.

Petitioner's recovery of interest lost and taxes and insurance premiums paid is supported not only by the specific decisions discussed in Point I, and the circumstances therein mentioned, showing that such damages were in contemplation of the parties, but is in accord with the specific rules of damages in cases of completion bonds issued to a mortgagee obligee (and the bond in this suit was one for indemnity as well).

It is elemental that a party breaking a contract is liable for all losses which are natural, certain and proximate.

In *Trainor Co.* v. *Aetna Casualty Co., supra,* Mr. Justice SUTHERLAND stated the primary or general rule applicable to mortgagee obligees in a bond guaranteeing completion, as follows:

> "Petitioner is entitled to be put in as good position in respect of its debt as it would have occupied if the buildings had been completed in accordance with the terms of the undertaking; * * *"

In *Kidd* v. *McCormick, supra,* the New York Court of Appeals stated the primary or general rule as follows:

> "Stated in its broadest form, the plaintiff is to have that compensation, which will leave him as well off as he would have been had the contract been fully performed."

Applying to this case the rules so laid down, it needs no argument to show that Prudence Company in this case cannot be put in as good position and cannot be as well off unless interest, taxes and insurance premiums are included in its damages.

If the building had been completed and ready for occupancy with all equipment installed, on December 16, 1930, Prudence Company could have immediately rented it instead of having to wait until October 1, 1931; and out of such rent it would have had a source of payment of its interest, taxes and insurance premiums.

The words "in respect of its debt" contained in the opinion of Mr. Justice SUTHERLAND, in *Trainor* v. *Aetna*, just quoted, have, as we read the opinion, a special significance in a case of this kind, and clearly mean that Prudence Company is to be put in as good position in respect of the interest on its investment and the taxes and insurance premiums which it must pay to protect its investment as it would have been in had the building been completed as guaranteed. Moreover, the words just quoted indicate, as we read them, that there is a direct causal connection between failure to erect the building and the failure of Prudence Company to obtain a source of interest on its debt.

Certainly, Prudence Company's loss of interest on its debt and the taxes and insurance premiums with respect thereto are directly related to the surety bond. If default under the bond were not an accompaniment of default in

completion within the anticipation of the parties, there would be no purpose in a mortgagee obtaining a bond for completion of a building. The fact that a breach of the obligation to pay the mortgage is also involved does not alter the causal relation between the delay in completion of the building and the loss of interest, taxes and insurance premiums.

Cf. Sauter v. *New York Central & H. R. R. Co.*, 66 N. Y. 50;
Lane v. *Atlantic Works*, 111 Mass. 136;
Torts Restatement (Am. L. Inst.) §447;
See *Purchase* v. *Seelye*, 231 Mass. 434.

Especially is this so where, as in this case, resort was to be had to the building guaranteed by the surety bond only in case of a default in the payment of the mortgage loan.

This causal relation is emphasized by the ground lease cases, where the bond guarantees the erection of a building by the lessee on leased property, and the Courts hold that damages are measured not simply by the addition which the building would make to the value of the reversion, but by the rent which its erection would secure. Thus in *O'Brien* v. *Illinois Surety Co.*, 203 Fed. 436, 439, C. C. A. 6, the Court (Judge Denison) stated:

> "Whenever a building, to be erected by a lessee, will materially increase the rental value of the premises, and the lease reserves to the lessor such a periodical rent that his stipulated right of reentry into the vacant premises may not be, of itself, ample indemnity for any default, it is clear that the building is intended to constitute, not only an additional rental payable at the end of the term,

> but also an additional security for the rent currently accruing. This intention is not alleged in the petition now under review, but we think the allegation unnecessary. Such intent stands out on the face of every such contract, and only under unusual conditions could it be lacking."

See also:

Rock v. *Monarch Building Co.*, 87 Ohio St. 244;
Kanter v. *New Amsterdam Casualty Co.*, 195 App. Div. 756, 760, aff'd 233 N. Y. 602.

Within the broad general rule of damages above stated, different kinds of testimony and different elements of damage may be considered in order in each case to put the obligee in as good position as he would have been had the bond been performed. Thus, in *Trainor* v. *Aetna*, Mr. Justice SUTHERLAND stated:

> "and this can be done *here* only by giving it the amount of the difference between the value of the unfinished buildings and their value as it would have been if completed in accordance with the agreement—see *Kidd* v. *McCormick, supra,* p. 398—but exceeding neither the *amount due on its debt* nor the amount of the bond.
>
> "It appears from the findings that this difference would be about $26,000, while the amount now due petitioner is $14,973.98, together with interest thereon from August 13, 1928."

The very fact that in *Trainor* v. *Aetna* the mortgagee obligee was given judgment for the amount due on his mortgage, *together with interest,* shows how clear is Prudence Company's right to interest in this case.

In *Kidd* v. *McCormick,* the Court states, immediately after the quotation made at the beginning of this point (*supra,* p. 38):

"* * * With more particularly, he has a right to a house as good as that which the defendants agreed to furnish; and his damages is the difference between the value of the house furnished and the house as it ought to have been furnished. One kind of testimony by which that difference may be made known, is that of experts, saying what would have been the value of the one, and what is the value of the other. Another kind of testimony is that of experts, what it would cost to complete the unfinished house up to the mark of the contract. Another kind is, when the house has been in fact finished, up to that mark, what it did in fact cost to finish it. But these ways all lead to the same end; what is the difference in value between the unfinished house and a house had it been finished as agreed upon. And this is to be observed of the last-named kind of testimony; *first,* that the plaintiff is not under obligation to go on and finish the house; *second,* that he cannot always finish it, as he could not in the case in hand, at the day called for by the contract, when there will come into the *damages* the element spoken of by Marvin, J., in 33 N. Y. (*supra*)* of *loss from delays;* and *third,* that the cost of actual building may have increased after the day of performance, and so be a detrimental gauge of damage for the defaulting contractor" (p. 396).

Whether the rule of damages be considered from the standpoint of difference in value, cost of completion, or impairment of security, the broad primary rule of putting Prudence Company in as good position as it would have been had the building been properly completed and within the time specified requires, under any of such rules, allowance of its actual loss in interest, taxes and insurance premiums.

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* *Morrell* v. *Irving Fire Ins. Co.,* 33 N. Y. 429.

1

The difference in value was one of the rules of damage which the respondents contended in the Circuit Court of Appeals and in their brief in this Court in opposition to the granting of this certiorari (q. v., pp. 8-11) should be the measure of damages in this case.

The Circuit of Appeals referred to the rule of difference in value as applicable in this case, but, erroneously, as we submit, concluded that interest, taxes and insurance premiums are excluded by such rule. From the very nature of surety bonds such as here involved, as well as the unreality of any valuation of an incomplete building, the phrase "difference in value" must be considered an approximate suggestion rather than a hard and fast formula. Specific rules including all the different elements of damage and sufficient to govern all cases cannot be couched in a sentence or a paragraph.

The rule that an obligee is entitled to be put in as good position in respect of its debt as it would have occupied if the buildings had been completed in accordance with the terms of the undertaking, is founded upon too firm a foundation of right and fair dealing to permit whittling away by slavish or blind adherence to a fixed formula.

While the rule of difference in value is not necessarily the sole standard of measuring damage in this case, the fact remains that even if that rule were to be applied in this case interest, taxes and insurance premiums during the period of completion must necessarily enter into the determination of difference in value.

As was stated in *Kidd* v. *McCormick* (see p. 23, *supra*), so here. Lack of a completed building could not have been "supplied * * * by a purchase in the market." An uncompleted building can be said to have value only in terms of its value when completed.

Necessarily, during the period required for completing a building, the owner (having purchased the uncompleted building) must pay, or—and it is the same thing—must lose, interest on his investment, as well as taxes and insurance premiums on the property. Thus, loss of interest on the investment, taxes and insurance premiums are included in the damages for delay which arise from the fact that, as Judge FOLGER stated:

> "he cannot always finish it" (the building) "* * * at the day called for by the contract."

Likewise, if we approach the matter from the standpoint of what a willing buyer would pay and a willing seller would take for the building in its condition on December 16, 1930, there is no escape from the conclusion that a willing buyer would necessarily be required to deduct from any amount which he otherwise would pay for this property on December 16, 1930, (1) interest on his investment (pending completion of the building), plus (2) the cost of labor and materials required in completion "up to the mark of the contract" and also (3) taxes and insurance premiums accruing during completion.

Assuming, then, that some expert should attempt to testify (as respondents insisted in the Court below should have been done) concerning said difference in value between the building in its state as of December 16, 1930 and the building completed as it should have been on that date, the result would be, and can be, no different from

that actually arrived at by the trial Court in this case. If anyone had bought this building in its uncompleted state on December 16, 1930, he must necessarily deduct from the amount he would pay for a completed building:

1. the cost of carrying the building pending its completion,—and that necessarily would include interest on his investment in the property (which in this case is $6,575,000), and such interest must run from the time he bought the property (in this case that date must be December 16, 1930) up to the time the building was completed (in this case October 1, 1931);

2. the cost of taxes and insurance pending completion;

3. the actual amount necessary to pay for labor and materials to complete the building, including whatever charges might be necessary for protection during completion;

and

4. the cost of supplying omissions and the difference in cost between the inferior materials which were substituted and the materials which the plans and specifications called for; this is necessary, because we must assume a building valued as though completed in accordance with the plans and specifications.

The above items and only the above items were included as elements of damage in the judgment in this case.

2

If we start from the point of view of the cost of completion, which the Circuit Court of Appeals stated "will be the guide" (R. p. 884), the first thing that is plain is that the payments for labor (including supervision) and materials do not represent the entire "cost of completion." (*Cf.* FOLGER, *Ch. J.*, quoted at p. 25, *supra.*)

Taxes, insurance premiums, and interest on the invesment during the construction period are uniformly treated for accounting, rate-making and general legal purposes, as part of the cost of construction, and must be included in "the entire cost of the erection, construction and completion of said building" (R. p. 596), which the sureties agreed to pay.

Thus, it is stated in *Horwath & Toth, Hotel Accounting* (1928), at page 284:

> "The cost of a new hotel includes the contract price as adjusted by extras and allowances resulting from changes in plans and in specifications, architect's fees, *interest on borrowed money and real estate taxes during construction* and such incidental expenses as permits, licenses, *and insurance.*"

See also:

Ohio Utilities Co. v. *Commission,* 267 U. S. 359, 361-63;

Denver Union Stockyard v. *United States,* 57 F. (2d) 735, 741-42 (D. Colo.);

Palmolive Co. v. *Conway,* 56 F. (2d) 83, 86 (C. C. A. 7);
United States v. *New York,* 160 U. S. 598, 621;
2 Kester, Accounting Theory and Practice (2d Ed.) 325-26.

It is significant in this connection that the building loan agreement provided for payment of interest out of the periodic advances during construction by the Principal (R. p. 576); and the bond provided, in case of completion by the Surety, for payment to Prudence Company out of unadvanced moneys, of interest as it accrued, on the entire amount theretofore advanced (R. p. 599).

The interest charge on such a completion job necessarily includes interest on the entire amount already invested in the building; it would be part of the owner's cost of construction, as just pointed out; and it is equally part of the lender's cost of completion.

3

The result is the same, if we apply the principle contained in the statement of the Circuit Court of Appeals that (R. p. 881):

> "The true measure of damages to this appellee, is the extent to which its security was impaired by the failure to complete in accordance with the plans and specifications."

That which was secured was petitioner's investment ($6,575,000) with interest thereon.

As Lord Justice Romer stated in *In re Atkinson,* L. R. [1904] 2 Ch. D. 160:

> "the security is a security, not only for principal, but for interest."

The "security" was to have been the building.

> "fully completed and ready for occupancy as a modern hotel not later than the 16th day of December, 1930, together with all equipment customary in a building of the type provided for in said building loan agreement, installed not later than the 16th day of December, 1930."

Any inquiry, therefore, concerning "the extent to which its security was impaired by the failure to complete" must necessarily embrace and envisage what petitioner lost because the building was incomplete and not ready for occupancy as a modern hotel, with all equipment installed; and this necessarily leads to the inevitable finding that petitioner has lost an income from the building out of which it could pay interest on its investment, taxes and insurance. Thus one of the elements of impairment of petitioner's security is the loss of income from the building to the extent necessary to pay interest, taxes and insurance.

POINT III

The provisions of the surety bond in this case specifically obligated the surety in express terms to pay interest on the loan, and taxes and insurance on the mortgaged property, until the date of actual completion of the building in accordance with the plans and specifications.

The statement of the Circuit Court of Appeals (R. p. 884) that

> "there is no condition, express or implied, respecting payment of the principal or the interest of the loan, taxes or insurance"

entirely disregards the provisions of the bond in this case.

It is not necessary or customary to set forth in a contract, which is primarily concerned with obligations of *performance,* all the possible items of damage in case of its breach. But the bond in this suit is more than usually all-inclusive in its terms, and its language adds a further specific ground for upholding interest, taxes and insurance as part of the contemplated damages.

1. *As to interest*:

Included in the obligations of the defendants contained in the surety bond is the following:

> "• • • and shall *make good* any and every other *default by the Principal in performing* any of the other terms, *covenants* or conditions in said *building loan agreement* set forth by the Principal to be kept and performed *up to and including the completion of and payment for said building* and installation of and payment for said equipment • • •" (R. pp. 596-97).

The building loan agreement and all and singular the terms thereof, are made a part of the surety bond (R. pp. 592-93) and in such surety bond the defendants state that they "are thoroughly familiar with all of the terms, provisions, conditions and requirements contained in said building loan agreement" (R. p. 595).

Turning then to the covenants of the Principal set forth in that building loan agreement, we find the following (R. p. 568):

> "and the Borrower" (Principal, Central Park Properties, Inc.) "agrees * * * to perform and comply with all and every of the covenants, terms and conditions herein and *in said bond and mortgage contained,*"

and the building loan agreement further specified that (R. p. 568)

> "Said loan shall be evidenced and secured by the bond of the Borrower"

and also (R. p. 569):

> "Third: Said bond shall be conditioned for the repayment of the amounts advanced thereon on the 16th day of December, 1930; together with interest at the rate of six (6%) per centum per annum due and payable on the 16th day of December, 1930, and quarter-annually thereafter and as hereinafter provided."

The building loan agreement further provides that interest on the full principal amount shall run from the date fixed for completion, whether or not the building be completed on that day (R. p. 570).

It follows, therefore, that when the defendants in their surety bond undertook to make good any default by the Principal

> "in performing any of the * * * covenants * * * in said building loan agreement set forth by the Principal to be kept and performed *up to and including the completion of* * * * said building and installation of * * * said equipment"

the defendants assumed an express contract obligation to pay the interest which the trial Court has awarded, viz., interest on the principal of the loan from December 16,

1930 to October 1, 1931, the date of the "completion of the building."

Thus it results that, apart from other evidence of what damages were contemplated, the respondents in their surety bond assumed a definite contract obligation to pay the interest which the trial Court awarded.

Citations by the Circuit Court of Appeals to the effect that "in the absence of express contract to pay interest, interest as damages cannot be recovered apart from the principal of the debt," have no application to the present case because, (1) as just shown above, there was here an express contract to guarantee interest up to and including the completion of and payment for said building; (2) the rule cited by the Circuit Court of Appeals has no application to a suit such as this is, where interest on a separate but related contract or sum of money is part of the *principal* of the damages (see citations, *supra,* pp. 33-35); and (3) loss of interest was part of the damages within the contemplation of the parties.

The sureties argued below that the liability for interest was in some way qualified by Mr. Lefcourt's separate and personal guaranty (Exhibit 10—R. p. 678—), which specifically guaranteed both the completion of the building and "the punctual payment of the full principal sum and interest of the bond and mortgage above described and all amounts advanced and to be advanced thereon and of any extension agreement thereof" (R. p. 680).

The fact that a collateral bond guaranteeing payment of the full amount of the mortgage makes specific mention of the interest on the mortgage along with the principal has nothing to do with the sureties' liability on an entirely separate bond which guarantees completion at a fixed time, and indemnity against default or delay in completion.

Moreover, Mr. Lefcourt's guaranty was limited (R. pp. 571, 681) by provisions typed into the printed form, so as to terminate upon the issuance of a certificate of occupancy (Exhibit 39), which certificate "was not a certificate of completion" (R. pp. 494, 879), and did not imply that the building complied with the plans and specifications (R. p. 494). In other words, Mr. Lefcourt's guaranty became "null and void" before the time when respondents could be called upon to make good under their bond.

Clearly, nothing in Mr. Lefcourt's guaranty or in any inference to be drawn from it, detracts from the clear language of the surety bond in this case or from the force of the reasoning and decisions which establish that interest, taxes and insurance during completion are part of the damages resulting from delay in completion.

The indemnity provisions of the surety bond, already discussed, (*supra*, pp. 27-28)—and Mr. Lefcourt's guaranty contained no indemnity provisions—also specifically obligate the sureties to the payment of interest lost during the period of completion.

At the risk of repetition, we again ask, how can there be indemnity if the petitioner is not placed in just as good a position as if the building had been completed on December 16, 1930?

2. *As to insurance*: The building loan agreement which the sureties guaranteed requires the Principal to pay (R. pp. 580-81):

> "fire, lightning and steam boiler explosion insurance together with any other insurance deemed necessary by Lender" (petitioner).

3. *As to taxes*: The surety bond itself recites that the bond is to guarantee completion of the building on December 16, 1930, in strict accordance with the building loan agreement and plans and specifications, and also "free from all liens."

Also among the obligations of the Principal as set forth in the building loan agreement was the obligation that petitioner's mortgage was to be "a valid first lien upon the premises" "free and clear of all liens and encumbrances" (R. p. 568).

Certainly the above obligations were violated by the non-payment of taxes. How can a mortgage be a first lien, as respondents guaranteed this to be, unless taxes on the mortgaged property are paid? (*Cf.* N. Y. Real Prop. Laws §253 [3].)

Moreover, payment of taxes is also covered by the provisions of the building loan agreement (R. p. 576) giving petitioner, as Lender, the right to apply any part of any advance in payment of interest or taxes due and declaring that the amounts so applied shall be deemed advanced to Central Park Properties, Inc. Those provisions clearly show the Principal was obligated to pay these items.

The building loan agreement certainly contemplated a building which when completed was to be free and clear of taxes and which was to be covered by proper insurance pending completion.

We believe it is obvious, moreover, that taxes and insurance premiums,—actual out-of-pocket payments,—were necessary expenditures for the completion of the building; otherwise in the case of fire or sale for unpaid taxes, petitioner would have had no building even after having spent large sums to complete it.

POINT IV

The measure of damages adopted by the trial Court was supported by proper evidence and conformed with all legal requirements.

The three classes of damage included in the judgment are set forth in the statement of the verdict directed (pp. 10-12, *supra*).

Respondents have repeatedly claimed that petitioner failed in its proof of damages in that it offered no *opinion evidence* of the difference between the value as an entirety of the property with the building uncompleted on December 16, 1930, and the value the property would have had if the building had been completed on that date according to the plans and specifications.

Inasmuch as this question may arise again, we respectfully submit that there is nothing in *Trainor Co.* v. *Aetna Casualty Co.* or in *Kidd* v. *McCormick* or in any other case which requires any different kind of proof than petitioner furnished. On the contrary, the petitioner's case on the amount of damages is in accordance with those two cases.

Respondent's liability to petitioner arises from the terms and provisions of the surety bond to which, and to the fullness of the scope contemplated thereby, we have already called attention.

In *Kidd* v. *McCormick* the Court of Appeals pointed out that the differences discussed were chiefly in

> "the *kind of testimony* by which the amount of damages was to be got at, rather than the *rule* that was to govern" (83 N. Y. at p. 397).

The Court then described three kinds of testimony, which the Circuit Court of Appeals in its opinion (R. p. 881) here also referred to, namely:

1. testimony of experts as to what would have been the value of the completed house and what is the value of the uncompleted house;

2. testimony of experts, "what it would cost to complete the unfinished house up to the mark of the contract"; (here also, as the Court stated, "the plaintiff is under no obligation to go on and finish the house." See also, surety bond—R. pp. 602-03); and

3. testimony as to the actual cost of finishing.

There is no necessity of furnishing every kind of testimony. The testimony offered by Prudence Company meets all the variations of the rules stated above.

1. We have already shown (*supra*, pp. 42-44) that interest, taxes and insurance must enter into any estimate of comparative value of the uncompleted and the finished building.

2. In proof of the damage suffered by omissions and substitutions which Prudence Company did not correct, testimony of experts as to the cost of completion was introduced. Prudence Company proved the reasonable cost of supplying the omissions and the reasonable difference in cost between the materials which had been substituted and the materials which the plans and specifications called for.

The findings of the trial Court with reference to the reasonable value of omissions and inferior substitutions

have in nowise been questioned by the Circuit Court of Appeals.

3. With respect to the work which was done in completion Prudence Company showed actual cost of labor and materials incorporated in the building.

Prudence Company did actually finish the building and therefore, under *Kidd* v. *McCormick* as well as under the elemental principles of damages, petitioner is entitled to the amount expended in order to do what the defendants did not do.

As stated by Mr. Justice CARDOZO in *Comey* v. *United Surety Co.*, 217 N. Y. 268, 276:

> "* * * The fact that he did complete it makes the proof of his damages more certain."

4. The Court of Appeals in *Kidd* v. *McCormick* also recognized damages for delay as an independent element, stating that

> "this is to be observed of the last-named kind of testimony" (testimony as to actual expenditures in completion) * * * "that he cannot always finish it * * * at the date called for by the contract, when there will come into the damages the element * * * of loss from delays" (83 N. Y. at p. 397).

The loss from delays cannot be better measured than by the interest lost and taxes and insurance premiums paid during the period of delay.

We respectfully submit, therefore, that every requirement has been met whereby this Court may rule that the three items of damage included in the judgment, namely,

1. Interest,

2. Actual cost of completion (including taxes and insurance),

and

3. Reasonable value of omissions and inferior substitutions,

were properly included in the judgment.

Conclusion

Upon adjudication by this Court that the three items of damage above mentioned are recoverable, a direction for reinstatement of the judgment of the trial Court would follow as a matter of course but for the direction for a new trial contained in the decree of the Circuit Court of Appeals.

A new trial has been ordered by the Circuit Court of Appeals on the ground of the exclusion of evidence "tending to show" that the president of the petitioner consented to certain substitutions, "*if* the appellee's" (petitioner's) "president had authority to waive the requirement of a written waiver or consent" (R. pp. 882-3). The evidence so excluded (R. p. 213) related to a supposed conversation between the president of the petitioner and a man who had been discharged from the work and who, at the time of the alleged conversation, had no legal relationship to it (see footnote, pp. 13-14, *supra*).

The parties to this action stipulated (R. p. 65) that the same be tried before a jury of one and that both parties should be deemed at the conclusion of the trial to

have moved for direction of verdict "without reservation of any right to have any issue or issues submitted to the jury."

There is, therefore, no constitutional restriction on the power of this Court, in reviewing such a verdict, to direct whatever disposition may be determined proper, including a modification in respect of part only of the judgment.

United States v. *Salmon,* 42 F. (2d) 353 (C. C. A. 5);

United States Potash Co. v. *McNutt,* 70 F. (2d) 126, 132 (C. C. A. 10);

Becker Bros. v. *United States,* 7 F. (2d) 3 (C. C. A. 2);

Board of Education v. *Maryland Casualty Co.,* 27 F. (2d) 20, 23 (C. C. A. 3).

The form of the verdict and judgment in this case make it particularly appropriate for the exercise of the now well-recognized power of the Court, if a new trial is ordered, to restrict it to the specific issue in respect of which error is found.

Farra v. *Wheeler,* 145 Fed. 482, 486-489 (C. C. A. 1);

Original Sixteen to One Mine v. *Twenty-one Mining Co.,* 254 Fed. 630, aff'd 265 Fed. 469 (C. C. A. 9);

Thorpe v. *National City Bank,* 274 Fed. 200, 202 (C. C. A. 5);

May Department Stores Co. v. *Bell*, 61 F. (2d) 830, 843 (C. C. A. 8);

See *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U. S. 494, 498-499;

Cf. Baltimore & Carolina Line v. *Redman*, 295 U. S. 654 (modifying a judgment of reversal by the Circuit Court of Appeals by substituting a direction for dismissal on the merits in place of a direction for a new trial).

Such power is all the clearer and more extensive in a case such as this, where no issues were submitted to a jury.

In view, therefore, of the stipulation (R. p. 65), we respectfully submit that this Court may, in addition to reversing the Circuit Court of Appeals,

(1) Conclude (as we submit is clearly the case) with the whole record before it that there is nothing to prevent the reinstatement of the judgment of the trial Court;

(2) Direct that, if a new trial is to be had on the ground that objections were improperly sustained to questions "tending to show" that an officer of the petitioner consented to certain substitutions, the decree of the Circuit Court of Appeals be modified so as to direct that such new trial be limited to the issue of the effectiveness of any alleged waiver, and the reasonable value of the omissions or substitutions, if any, which were "effectively consented to" (R. p. 884);

or

(3) Remand the case to the Circuit Court of Appeals with leave to petitioner to apply for a rehearing on the question of waiver.

The decree of the Circuit Court of Appeals should be reversed or modified so as to embody a direction that interest on petitioner's investment between the date on which the building should have been completed and the date on which it was actually completed, and also taxes and insurance premiums paid during such period, be included as items of damage, and also that if a new trial is to be had, the issue on new trial be limited to the issue of effectiveness of any alleged waiver and the reasonable value of the omissions or substitutions, if any, which were effectively consented to.

New York, December 21, 1935.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1935

No. 270

THE PRUDENCE COMPANY, INC.
Petitioner

v.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND AND AMERICAN BONDING COMPANY OF BALTIMORE

REPLY BRIEF OF PETITIONER

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Conclusion. The decree of the Circuit Court of Appeals should be reversed or modified so as to embody a direction that interest on Petitioner's investment between the date on which the building should have been completed and the date on which it was actually completed, and also taxes and insurance premiums paid during such period, be included as items of damage, and also that if a new trial is to be had, the issue on such new trial be limited to the issue of effectiveness of any alleged waiver and the reasonable value of the omissions or substitutions, if any, which were effectively consented to 26

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Supreme Court of the United States

October Term, 1935

No. 270

THE PRUDENCE COMPANY, INC.,

Petitioner

v.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND AND AMERICAN BONDING COMPANY OF BALTIMORE.

REPLY BRIEF OF PETITIONER

Respondents' brief entirely ignores the requirement of the Building Loan Agreement and the Surety Bond that the building be completed and ready for occupancy on a specific date, to-wit, December 16, 1930.

Respondents attempt to escape this specific obligation by lengthy references to immaterial facts as well as by inaccurate statements. They make no attempt to answer the cases cited in our brief (particularly on pages 33-36) which show that part of the damages for delay in completion have been generally recognized to include interest lost on the amount invested during the period of delay in completion.

In addition to this, Respondents ignore the express holding in *Kidd* v. *McCormick*, 83 N. Y. 391, 397, that:

> "And this is to be observed of the last-named kind of testimony" (viz. what it did in fact cost to finish the building up to the mark of the contract); "*first* that the plaintiff is not under obligation to go on and finish the house; *second*, that he cannot always finish it, as he could not in the case in hand, at the day called for by the contract, *when there will come into the damages the element* spoken of by Marvin, J., in 33 N. Y. (*supra*)* *of loss from delays;*"

Respondents' mistaken claim that the complaint does not allege interest, taxes and insurance premiums as damages by reason of the default under the surety bond, is contrary to the record.

The complaint pleads (R. p. 9-11) the entire condition of the surety bond, including Respondents' agreement to (R. p. 11)

> "make good any and every other default by the Principal in performing any of the other terms, covenants or conditions in said building loan agreement set forth by the Principal to be kept and performed up to and including the completion of and payment for said building * * *."

The complaint alleges (R. p. 13):

> "XXIII. The said Principal (Central Park Properties, Inc.) * * * failed to comply with said Building Loan Agreement * * *."

* *Morrell* v. *Irving Fire Ins. Co.*, 33 N. Y. 429.

The complaint also alleges (R. p. 15):

> "XXVI. Said Surety" (the two Respondents here) "has not made good the defaults on the part of the Principal (Central Park Properties, Inc.) hereinabove set forth, or any of them."

The complaint then alleges (R. p. 17):

> "XXXVII. By reason of the defaults of said Central Park Properties, Inc. and the defendants hereinabove set forth, this plaintiff has been damaged in the sum of Seven hundred eighty-eight thousand, six hundred seventy-six and 94/100 dollars ($788,676.94), with interest thereon as hereinafter set forth, in that"
>
> (Here follow seven specific items, including taxes, insurance premiums, and interest of which plaintiff alleges it "has been deprived" (R. p. 18) on the sum of $6,575,000.)

Thus is dispelled the mistaken notion set forth in Respondents' brief (pp. 20 and 21) that Petitioner's claim for interest, taxes and insurance premiums both as damages and by reason of default in the building loan agreement, has not been properly set up or claimed.

Respondents' "more complete statement of the case" is both wide of the mark and inaccurate.

Immaterial Statements

As instances of so-called statements of fact which are wide of the mark, we refer to the following:

1. Any detailed reference to the loan acceptance (Defendants' Exhibit A) is entirely immaterial, not only

because there are no statements in the loan acceptance which in any way support Respondents' extravagant claims, but also because such loan acceptance was merged (or to use the language of Respondents' counsel on the argument, "transmitted into contractual form") in the subsequently executed building loan agreement, which in turn is a part of the surety bond.

2. The fact that the Principal paid $4,000,000 for the land in 1928 is utterly immaterial. (See holding to that effect in *Mechanics Trust Co.* v. *Fidelity & Casualty Co.*, 304 Pa. 526).

Moreover, any attempt by Respondents to disassociate the land from the building or *vice versa* is an attempt to put Petitioner in the position of making a loan on land without building, which is just the opposite of what Petitioner required the Respondents to guarantee in this case. As a matter of fact, Respondents' emphasis on the amount paid for the land and the amount paid for the building shows that Petitioner was willing to lend only a portion of the Principal's actual cost of land and building, and that Petitioner insisted on a margin (equity) between the amount of its loan and the value of the property (with the building fully erected thereon) which was to be security therefor. Respondents' bond guaranteed that Petitioner should have that building and whatever margin of security that specific building, fully completed and ready for occupancy, would afford. In other words, Petitioner is the only one who could or can decide on the amount of security for its loan, and Respondents cannot escape liability under their bond on any claim that a different kind of security was just as good or should be sufficient.

3. The advances made by Petitioner of the full amount of the loan (viz., $6,650,000) and the application by Petitioner of $75,000 to reduce the mortgage principal, were entirely according to the building loan agreement. Respondents' statement at the head of page 4 with reference to how advances were to be made, omits the very material provision in the building loan agreement (R. p. 570) that "Said loan is to be advanced in such amount and at such times as Lender approves," and (R. p. 575) "Advances may be made as and when the Lender" (Petitioner) "or holder of the mortgage believes it advisable so to do, and all such advances or payments shall be deemed to have been made in pursuance of this agreement and not in modification thereof."

Not only was the reference to the 75% clause (to which Respondents have referred on p. 4) held to be immaterial in Judge BONDY's opinion (R. pp. 525-29) on motions directed to the sufficiency of the answers, but Respondents' assignments of error directed thereto were overruled by the Circuit Court of Appeals. Moreover, the Circuit Court of Appeals held that Respondents' claims with reference to the $75,000 which was applied by Petitioner to reduce its mortgage principal afforded no possible basis of defense on the part of Respondents. The language of the opinion is, "this defense therefore must fail" (R. p. 880).

4. Respondents' claim that Petitioner did not make any claim for interest before the completion of the building is utterly immaterial because, obviously, Petitioner could make no claim for interest until it knew the length of time it had lost interest on its investment.

5. The reference by Respondents to notices given them by Petitioner with respect to defaults is immaterial, because there is no question in this case but that notices were properly given as soon as Petitioner learned of the defaults.

Inaccurate Statements

1. At page 4 Respondents make the inaccurate statement that there was "an explicit understanding that a great part of the principal of the loan would be satisfactorily secured by the land alone which had cost the Principal $4,000,000 (R. p. 798) and that the building would be security for only part of the loan."

Not only is the above statement without the slightest foundation, but it is fundamentally and absolutely inaccurate.

The reference made by Respondents to page 798 of the record is to a statement in the loan acceptance that the acceptance by Petitioner of the loan is, at Petitioner's "option, conditional upon the following representations made by" the Principal, including the statement that the Principal paid $4,000,000 for the land in the year 1928.

The outstanding fact, however, is that Petitioner would *not* make this loan, or even any advance thereon, unless it had Respondents' surety bond both guaranteeing that *the* building would be fully completed and erected on the land on or before December 16, 1930,—and that, too, in strict accordance with the plans and specifications,—and also agreeing to indemnify the Petitioner for any default of the Principal in performing the obligations of the building loan agreement. In other words, the land without the completed building, constituted no security and until the

building was completed Respondents guaranteed performance by the Principal of all the covenants of the Building Loan Agreement.

2. On page 9, Respondents make the statement that "$6,000,000 was bid and paid for the property on the foreclosure sale," and then follow with the statement that "Petitioner, instead of investing that $6,000,000 in some other manner, re-invested in this particular property."

Advisedly, we here state that there is no excuse for such inaccurate statements.

On the trial Respondents offered in evidence (R. p. 314), Paragraph XXXIX of the complaint, with this statement by Respondents' counsel:

> "Mr. Murray: Then I shall offer in evidence Paragraph XXXIX of the complaint, which gives the facts as to the foreclosure of the mortgage and the sale upon said foreclosure."

Paragraph XXXIX of the complaint specifically states that Petitioner "caused the mortgage • • • to be foreclosed," and that the plaintiff in the foreclosure action "represented and was a nominee of" this Petitioner, and that the mortgaged premises "were sold to a nominee of this plaintiff" (Petitioner) "for Six million dollars ($6,000,000)." It therefore conclusively appears by evidence which the Respondents themselves offered on the trial that this $6,000,000 was Petitioner's own money, and was never actually paid to Petitioner for the land and building, and of course was never available for reinvestment (as erroneously repeated at page 31 of Respondents' brief), but always remained tied up in this building, where it

had been invested on the strength of Respondents' surety bond.

Thus is shown the absolute inaccuracy of the above statement by the Respondents.

3. Respondents, in their attempt to whittle away their liability under this bond, repeatedly refer to descriptions of the bond contained in the Building Loan Agreement and in the recitals of the surety bond itself, but each of these references omits a material part of the description of this surety bond, namely, that such surety bond was (R. pp. 578, 594) "to be in form and contents satisfactory to" Petitioner.

It is because the surety bond contained, among other provisions, the provision that obligated these Respondents to "make good any and every * * * default by the Principal in performing any of the * * * terms, covenants or conditions in said building loan agreement set forth by the Principal to be kept and performed up to and including the completion of and payment for said building," that Petitioner accepted that bond and made this building loan.

In other words, the provisions of the bond itself—and not any attempted short description thereof—, must control in deciding what the obligations of the bond actually are.

4. Respondents' statement on page 10 that "four months was consumed in making" alterations in the building "to suit Petitioner's fancy" is also flatly contradicted by the record. Although Respondents refer (p. 31 of their brief) to an answer of Petitioner's witness, Mr. Lukach, on cross examination, the fact is that Mr. Lukach

testified unequivocally (R. pp. 309-310) that the work of completion did not stop while alterations were going on but that the completion and any alterations which were made "were going along *pari passu.*"

Any reference by Respondents to changes which Petitioner made in the plans and specifications after Petitioner itself had commenced the completion, is also utterly immaterial because not only did Petitioner have the right to make changes under the surety bond (R. pp. 602-3), but also as affirmatively held in *Kidd* v. *McCormick* and in *Board of Education* v. *Maryland Casualty Co.*, 27 F. (2d) 20, 21 (C. C. A. 3) Petitioner was not required to complete the building in accordance with the plans and specifications.

5. The statement at page 9 of Respondents' brief that "part of the building was actually tenanted in August, 1931," is not supported by the portion of the record referred to and is contrary to the actual fact. (Respondents have never before made any such claim.) It is natural that one who has rented quarters for occupancy on October 1, will make arrangements before then to have them altered to suit his needs, and it is also natural to refer to such a person as a tenant of certain quarters, even though he is not in possession thereof. All that Mr. Zilber's testimony on page 480 means is that a dentist who had rented a room in the building, on a lease to begin October 1, 1931, wanted to have it altered in advance so that it might be suitable for his occupancy when his lease began. There is no evidence of any agreement to pay rent before Ocotber 1, 1931, and, in fact, there was no such agreement.

6. On page 11, Respondents state there is absolutely no foundation for the statement in the second note on page 7 of Petitioner's brief "that the omissions and substitutions detracted from the value of the building" and that the pages which we have cited contain no evidence that the value of the building was lessened.

Although it was unnecessary for Petitioner to prove that the omissions and substitutions which were deliberately and secretly made detracted from the value of the building, since Petitioner was entitled to *the* building and not *a* building, we point out also that the above mentioned statement by Respondents is erroneous; the citations of the record which we have made on page 7 of our brief conclusively show the respects in which each specific omission or substitution which was in any way contested by Respondents at the trial detracted from the efficient operation, appearance, or value of the building.

7. The statement on page 26 of Respondents' brief that the Petitioner has failed to call the Court's attention to the whole of the provision relied upon with respect to payment of taxes is erroneous, and inexcusably so. Petitioner quoted (Brief p. 52) a portion of the covenant in the building loan agreement, by which the Respondents guaranteed that the building to be erected should be "free and clear of all liens and encumbrances" (R. p. 568). The quotation which Respondents make (Brief p. 26) is from a portion of the condition of the Surety Bond (R. p. 596), on which we did not rely and which does not purport to, and could not, limit the specific obligation of the covenant just quoted. We have used the word "inexcusably" advisedly, because Respondents made this same claim in their brief in opposition to our application to this Court for certiorari and in our reply brief (p. 6), we specifically called attention to their mistake.

I

Plaintiff's right to recover the item of interest awarded by the trial court was not affected by its foreclosure of its mortgage.

(Replying to Respondents' Point IV)

Respondents' attempt to defeat the item of interest as an element of damage on the ground that "the status of Petitioner as mortgagee ceased" when the judgment of foreclosure and sale was entered "and the mortgage debt was *ipso facto* merged in the judgment," must fail on many grounds.

1. In the first place, the item of interest included in the judgment is interest lost on Petitioner's *investment* of $6,575,000; and the loss of interest thereon did not cease to exist, as erroneously claimed by Respondents.

Furthermore, in *Kidd* v. *McCormick* (83 N. Y. 391) there had been a foreclosure, and the property was bought in by the plaintiff himself; notwithstanding that, the New York Court of Appeals held that interest on plaintiff's own mortgages, and the amount he had to pay for taxes and insurance premiums, were items of loss which must be considered. (See also *Province Securities Corp.* v. *Maryland Casualty Co.*, 269 Mass. 75; *Mechanics Trust Co.* v. *Fidelity & Casualty Co.*, 304 Pa. 526.)

We have already shown that Petitioner itself bought in the property on the foreclosure. Any attempt, therefore,

to show that Petitioner did not lose interest on $6,575,000 from December 16, 1930, to October 1, 1931, is an attempt to substitute form for substance, and ignores the undisputed fact that Petitioner *did* lose interest on its investment of that amount in cash.

The $6,000,000 for which the building was "sold" on foreclosure was Petitioner's money. The loss of interest thereon is just as much an item of damage, whether the $6,000,000 be viewed as an involuntary investment in an incompleted building, or as still apart of the amount advanced under the mortgage loan.

2. This action is against the Respondents on their surety bond, and not against the maker of, or on, the bond and mortgage. The obligation of the Respondents to reimburse Petitioner for the interest arises out of and is *contained in Respondents' surety bond.*

There was no merger of the surety bond in any judgment.

The only judgment in which Respondents' obligation is merged is the judgment in this case, which is the subject of this review.

The change in relations between Petitioner and the Principal through foreclosure of the mortgage after the Principal's default has no effect upon the relation between Petitioner and Respondents under their bond, or on the nature of the rights which that bond was intended to protect.

3. Respondents' surety bond specifically provides (R. p. 605):

> "All remedies afforded to the Obligee hereunder are *cumulative* and shall be construed as not limit-

ing or prejudicing *any other legal or equitable remedy* which the Obligee may have in the premises."

Quite aside from the fact that the Petitioner's investment remained tied up and frozen after the foreclosure sale and bidding in of the property by Petitioner's nominee, the italicized portion of the above quoted provision of the Respondents' surety bond certainly prevents the Respondents from even attempting to raise any such technical point as here advanced. In other words, Petitioner has recourse against Respondents in addition to ("cumulative" to) the foreclosure of its mortgage.

4. The judgment on which Respondents base their argument is a deficiency judgment entered April 30, 1931, for $716,215.02. If that judgment took the place of Respondents' obligation, then the judgment against Respondents in this action would have been very much more than it is.

II

The rule of difference between the value of the uncompleted building and its value if it had been completed in accordance with plans and specifications, does not prevent recovery of interest, taxes and insurance premiums.

(Replying to Respondents' Point I)

Respondents' Point I is sufficiently answered by the holding in *Kidd* v. *McCormick,* which we have quoted at

page 2 of this reply brief, and Respondents unite with us in stating that that case is controlling here. The quotation so made immediately follows the third type of evidence to which Respondents refer at the foot of page 15 of their brief.

In other words, *Kidd* v. *McCormick* is direct authority for recovery by Petitioner of loss from delays and as shown by the cases cited at pages 33-36 of our main brief, such loss from delays is properly measured by interest, taxes and insurance premiums.

The difference in value to be attributed to the omissions and substitutions is not to be proved only by expert testimony which compares the value of the entire building if completed in strict accordance with the plans and specifications, and the value as it was with items omitted and inferior items substituted. The proof actually introduced by Petitioner showing the reasonable cost of supplying omissions and the difference in value of each inferior item substituted for items called for by the plans and specifications is the best evidence of the damages suffered by Petitioner from failure to furnish *the* building guaranteed; that is to say, from failure to comply with the plans and specifications in respect to the omissions and inferior substitutions.

This must necessarily follow because Petitioner was entitled to *the* building guaranteed by the surety bond in this case and not *a* building. For this reason it is equally clear that it is not open to Respondents or any real estate expert or a jury or even the court to say that a different building offered security just as good or of equivalent value as that which was guaranteed to Petitioner. In other words, Petitioner is the only one who

can decide upon the *kind of security* it desires for its loan and, therefore, if the specific building guaranteed by the surety bond is not furnished, any assertion that a building with omissions and substitutions was just as good or almost as valuable cannot deprive Petitioner of the security for which it bargained, and upon which it insisted. It follows, therefore, that any proof—if it had been offered—of so-called difference in value of the entire building with and without the omissions and inferior substitutions, which ignores the actual proved value of those omissions and substitutions, could not deprive Petitioner of its loss by reason of not being given the guaranteed security.

III

With reference to *Kidd* v. *McCormick* and *Trainor* v. *Aetna Casualty Co.*

(Replying to Respondents' Point II)

The error of Respondents' counsel in stating on page 18 of their brief that "nowhere in the opinion in *Kidd* v. *McCormick*, was it even hinted that interest, taxes and insurance premiums could be recovered as such" is clearly shown by the following quotation from the opinion in *Kidd* v. *McCormick* (83 N. Y. at 398):

> "It is plain that to repay him just what he expended to finish the buildings would not make him whole; for he had to pay, besides the cost of building, interest to Granniss" (first mortgagee) "*and lose interest on his own mortgages, and pay taxes and premiums.*"

We have already shown in our main brief (p. 24) that the fact that the plaintiff in *Trainor* v. *Aetna Casualty Co.* (290 U. S. 47), was a third mortgage is no ground of dictinction, as now claimed by Respondents (p. 19 of their brief).

IV

Both under the terms of respondents' bond and under the law of damages, petitioner is entitled to interest, taxes and insurance premiums.

(Replying to Respondents' Point III)

A

With Reference to The Terms of The Bond:

(Replying to "A" in Respondents' Brief)

The inherent difficulty in Respondents' position in this case is shown by the claim they are forced to make, namely, that their bond is "a naked completion bond and nothing but a completion bond."

That this bond is very much more than a completion bond is apparent from a reading of its provisions.

The argument contained in Respondents' brief that Petitioner's complaint did not claim interest as a contract obligation has already been answered in this reply brief (*supra*, p. 2).

There is no foundation for the claim that "petitioner's own prior practical interpretation of the instru-

ments" defeats its right to recover interest, taxes and insurance premiums or that the Petitioner's conduct is inconsistent with the demand for interest, taxes and insurance premiums. As shown on the argument, the letters and notices forwarded to Respondents in the Spring of 1931 were not statements of cost of completion already paid, but were lists of items remaining to be completed or corrected, together with estimates of the expense for labor and materials which would be required to complete or correct them. The amount of damages which Petitioner would suffer by loss of interest, taxes and insurance premiums during the period of completion was not yet determined and could not then have been stated, nor would such statements be appropriate parts of such letters or notices. Petitioner could not know until October 1, 1931, when the building was fully completed, what was the full measure of its loss from delay.

Nor can any reference by Respondents to the terms of the guaranty given by Mr. Lefcourt assist Respondents in cutting down the obligations contained in their surety bond. In the first place, any real security to Petitioner was taken away from Mr. Lefcourt's guaranty by the express limitation which was inserted in the regular printed form, viz. (R. p. 681):

> "Anything contained herein to the contrary notwithstanding, the obligation of the undersigned under this guarantee shall cease and this guarantee shall become null and void when the Municipal and/or State Departments having jurisdiction have issued the customary certificates of occupancy."

It is conceded in this case that "the customary certificate of occupancy" is not a certificate of completion (R. pp. 494, 879).

The certificate of occupancy was issued October 3, 1930. Therefore, Mr. Lefcourt's guaranty was null and void long before the first date on which Respondents could be called upon to make good on their bond.

In the second place, Mr. Lefcourt's guaranty was not written in the form of a bond with condition, and the form and approach thereto were, therefore, entirely different. Two different draftsmen may very well arrive at the same result in different types of instrument by different form and different language.

Respondents, in referring to the description of the surety bond as contained in the building loan agreement and the recital in the surety bond itself, repeatedly omit the words contained in such description, to wit, "in form and contents satisfactory to the Lender."

That Respondents' counsel themselves understood the building loan agreement to obligate the Principal to pay interest on Petitioner's loan is shown by the following quotation from page 26 of their brief in the Circuit Court of Appeals:

> "From the instrument which evidenced the relations between plaintiff and Central Park Properties, Inc. (Building Loan Agreement, Plaintiff's Exhibit 1), it is perfectly clear that the latter *assumed two separate* obligations; first, the repayment of the principal of a loan in the sum of $6,650,000 *with interest;* second, the construction and completion of a building in accordance with the terms of the building loan agreement and plans and specifications." (Italics added.)

It follows, therefore, that Respondents' bond was more than a guaranty only of completion of the building.

Nor will the argument of Respondents' counsel that our demonstration of how the surety bond itself expressly obligates Respondents to pay interest is "too fine-spun" bear analysis. On the contrary, we believe it as simple as A B C.

Let A equal the surety bond, which guarantees that Respondents "shall make good any and every other default by the Principal in performing any of the other terms, covenants or conditions in said building loan agreement set forth by the Principal to be kept and performed up to and including the completion of and payment for said building" (R. pp. 596-7).

Let B equal the building loan agreement which is referred to in A and which is made part of A, by which building loan agreement the Principal agreed "to perform and comply with all and every of the covenants, terms and conditions herein and in said bond and mortgage contained" (R. p. 568), and by which building loan agreement it was provided that the bond and mortgage just referred to were to be the bond and mortgage *of* the Principal (R. p. 568), and that such bond and mortgage should obligate the Principal to pay interest at the rate of 6% per annum on the full amount of the loan on December 16, 1930, and quarter-annually thereafter (R. pp. 569-70), and in which building loan agreement the Principal also agreed that "Interest on the full principal amount" ($6,650,000) "shall run from the date herein fixed for completion (whether or not the building be completed on said date)" (R. p. 570).

Let C equal the obligation to pay interest.

Since A includes B and B includes C, it must follow that A includes C.

B

With Reference to Recovery of Interest as Damages

(Replying to "B" in Respondents' Brief)

Respondents' argument that the authorities forbid the allowance of interest against a party who is not liable for the principal is completely answered by the cases cited at pages 33 to 36 of our main brief.

In addition to the quotation from *Wood* v. *Joliet Gas Light Co.*, 111 Fed. 463, contained on page 35 of our main brief, we called attention on the argument to the language of this court in *New York &c. Mining Co.* v. *Fraser*, 130 U. S. 611, at page 622, where this court expressly held that in the absence of evidence of rental value interest on the investment can be taken as the measure of damages caused by delay.

Hamilton v. *Rensselaer*, 43 N. Y. 244, which now seems to be the main reliance of Respondents in this respect, is clearly not in point. In that case there was an express guaranty of interest, but not of principal, up to a specified time. The court held that the guarantor was not liable for interest beyond the specified time. In this case, the specified time was the actual completion of the building and the Petitioner has neither asked for nor been allowed interest as damages beyond that date.

C

(Replying to "C" in Respondents' Brief)

Respondents' claim that there is no causal relation between loss of interest, taxes and insurance premiums and failure to complete the building is, we submit, negatived by this court's use of the words "in respect of its debt" in *Trainor* v. *Aetna Casualty Co.*

We have already shown (*supra*, p. 7) the error of Respondents' statement (p. 31 of their brief) that Petitioner's own witness testified that four months were spent in making alterations in the building, and that the notion that "$6,000,000 worth of principal" was "available" to Petitioner "for investment," is entirely erroneous. We have also shown that the building was not tenanted in August, 1931.

For defendants to argue that failure to complete the building was not a direct, natural or proximate cause of the loss of interest is a legal quibble without foundation or substance. The fact that a default by the principal debtor in repaying the loan and the interest thereon would have to concur with the default in prompt completion, is clearly no defense to the liability of these Respondents as sureties. The very purpose of the surety bond was to protect Petitioner from the consequences of the principal's failure to perform its obligation to pay principal and interest on the loan advanced by Petitioner. In case of negligence the fact that an intervening act of a third person is itself negligent does not make it a superseding cause if a reasonable man would not regard such intervening act as

extraordinary (Torts Restatement, Section 447). The same rule applies here; and certainly no sensible person can argue that the failure of Petitioner to receive money to cover interest was an extraordinary intervening act after the default in completion on the date guaranteed.

This same argument was answered in *Kidd* v. *McCormick*, where defendants sought to claim that the fund in suit was to guarantee only completion, and not payment of the mortgages. The court stated (83 N. Y. at 398):

> "The appellants claim that the trust fund was not a collateral to the plaintiff's mortgages. It is true that it was not made so in direct terms, but it was collateral that the houses would be built; and as that could not be without helping the security of the plaintiff's mortgages indirectly, the trust fund operated as collateral to the mortgages."

And see *O'Brien* v. *Illinois Surety Co.*, 203 Fed. 436 (C. C. A. '6), quoted at pages 39-40 of our main brief.

Respondents rely very largely in their brief on two cases, each of which are cited three times, viz.: *Province Securities Corp.* v. *Maryland Casualty Co.*, 269 Mass. 75 and *United Real Estate Company* v. *McDonald*, 140 Mo. 605. The first case was cited by the sureties in the *Trainor* case and rejected by this court as contrary to reason and the weight of authority; the second was cited by the plaintiff in the *Trainor* case (See his brief, pp. 16-17) only on the point of the difference between a bond of guaranty and a bond of indemnity (the bond in this suit is one both of guaranty and indemnity); and its citation by this court in the *Trainor* case cannot be construed as

approving the inference which Respondents now seek to draw from it (even, assuming, contrary to what we consider to be the case,—see *Illinois Surety Co.* v. *Davis Co.*, 244 U. S. 376, 381—that this court would be at liberty to reject the New York rule of damages). Moreover, the attitude of the Missouri court with reference to damages due to delay is shown by the later case of *Smyth Realty Co.* v. *American Surety Co.*, 292 Mo. 423, where, under a bond that a lessee would complete a building within a specified time, the court held that the building was to constitute additional security for the rent accruing (together with taxes and insurance) and, $28,000 of rent having accrued, and the building (which was to have cost $110,000) not having been built, it granted judgment for the full amount of the bond ($25,000).

Since it was the purpose of the surety bond to guarantee a building which would provide for the payment of taxes, interest and insurance, those items constitute, as held in *New York Mining &c. Co.* v. *Fraser*, 130 U. S. 611 (*supra*), at least the prima facie measure of Petitioner's damages by delay in completion. It is not open to respondents, without having offered any proof on the subject, to argue that the contemplation of the parties in this respect must have been defeated, and that an alternative measure of damages which they did not suggest to the trial court, namely, rental value, would result in an award of less than what the trial court found had been contemplated and proved; they cannot thus easily escape the penalty of their bond, when Petitioner's actual loss is beyond question.

V

The amount awarded to petitioner as damages by reason of omissions and inferior substitutions cannot be reduced by what experts might testify to be the difference in value between a building with and without such omissions and inferior substitutions.

(Replying to Respondents' Point V)

We have already corrected (*supra,* p. 10) the mistaken assertion by Respondents that there was no evidence of lessening in value by reason of the material omissions and substitutions of which the Principal was guilty.

Since Respondents guaranteed (among other obligations) the completion of *the* and not *a* building, it would not in any event be open to the Respondents to claim (by some experts testifying to little or no difference in value)* that the building, with items called for by the specifications omitted, or inferior materials substituted, was just as good and should be just as satisfactory a security to this Petitioner as the building which was guaranteed to be erected. In other words, it is not open to someone else to say what kind of security Petitioner should have for its mortgage.

Moreover, Petitioner's proof met the test of *Jacob & Youngs* v. *Kent,* 230 N. Y. 239, cited at page 36 of Respondents' brief. That case stated that "in most cases

* Much less may they now argue that it was proved by the testimony of the very men who, in violation of the building loan agreement, and over the protests of the architect, insisted on such departures from the plans and specifications.

the cost of replacement is the measure * * * unless the cost of completion is grossly and unfairly out of proportion to the good to be obtained. When that is true, the measure is the difference in value." In that case, the only difference from the specifications was the use of wrought iron pipe manufactured in Cohoes instead of wrought iron pipe of the same description and quality manufactured in Reading; it was an extreme case on facts peculiar to that case on which the court held that there had been substantial performance.

An examination of Plaintiff's Exhibit 85 (pp. 763-66) will show how substantial and material were the omissions and substitutions which are included in the judgment in this case.

In the present case Petitioner proved the cost of supplying omissions only in cases where items called for by the plans and specifications had been completely omitted. In cases of inferior substitutions it proved the difference in value between the item called for by the plans and specifications and the item supplied. For example, where terrazzo, a composition of marble dust, cement and sand (R. p. 182), was substituted for marble, Petitioner gave Respondents the benefit of the doubt, and, although it might well have been entitled to the entire cost of removal and replacement for such a material substitution, particularly where—as in this case—the variation was intentional (*Turner* v. *Henning,* 262 Fed. 637), it claimed, and was allowed, only the difference in value between terrazzo and marble (R. pp. 236, 765).

CONCLUSION

The decree of the Circuit Court of Appeals should be reversed or modified so as to embody a direction that interest on Petitioner's investment between the date on which the building should have been completed and the date on which it was actually completed, and also taxes and insurance premiums paid during such period, be included as items of damage, and also that if a new trial is to be had, the issue on such new trial be limited to the issue of effectiveness of any alleged waiver and the reasonable value of the omissions or substitutions, if any, which were effectively consented to.

New York, January 11, 1936.

Respectfully submitted,

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SEP 14

Supreme Court of the United States

October Term, 1935

No. 270

THE PRUDENCE COMPANY, INC.,
Petitioner,

against

FIDELITY & DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

JOHN W. DAVIS,
JOSEPH F. MURRAY,
THOMAS E. WHITE,
Counsel for Respondents.

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RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

Statement of Facts.

The statement of facts contained in the petition does not contain certain material facts which are necessary to a determination of the questions presented. For that reason, we supplement the statement contained in the petition with the following facts.

The building loan agreement provided for the delivery to petitioner of a bond and mortgage in the sum of $6,650,000, which was to mature on December 16, 1930, on the same date fixed for the completion of the building, and this bond and mortgage was executed and delivered (R. pp. 569, 592, 678).

Nowhere in respondents' bond is there any provision guaranteeing the performance of the provisions of the bond and mortgage. Respondents' bond guaranteed only the performance of the provisions of the building loan agreement (R. p. 596).

At the same time that respondents' bond for the completion of the building was furnished, the petitioner received from a third party, Lefcourt, pursuant to the provisions of the building loan agreement, a guaranty of performance of all the terms, conditions and covenants of the bond and mortgage, including the payment of the principal sum and interest (R. pp. 571, 679, 680).

On the date fixed for the completion of the building and the satisfaction of the mortgage, there was a default on the bond and mortgage (R. pp. 19, 722). Because of such default, a foreclosure action was started by petitioner two days later, on December 18, 1930 (R. p. 19). On or about January 6, 1931, the borrower signed an agreement giving the petitioner possession of the premises (R. p. 725). Judgment of foreclosure and sale was made and entered on January 19, 1931 (R. p. 19). The property was sold for $6,000,000 on March 17, 1931 (R. pp. 19, 20). A deficiency judgment was entered on April 3, 1931 (R. p. 20).

The petitioner claimed the building was actually completed on October 1, 1931. No evidence was adduced by the petitioner to establish what would have been a reasonable time within which to complete the building after the default. The respondents, however, adduced uncontradicted testimony that the work done to complete the building after the default could have been done in a period of from four to eight weeks (R. p. 436). The petitioner claimed interest, taxes and insurance premiums for the whole period from the date of the default up to the date it claimed the building was actually completed (R. pp. 18, 19).

The only defaults claimed in the complaint were defaults in constructing, paying for and completing the building (R. pp. 13-16, Paragraphs XXI-XXVII, XXXII). Nowhere in the complaint was it alleged that there was any express obligation to pay interest on mortgage, taxes or insurance premiums, and in claiming for such items the theory was that they were damages flowing from the defaults in the completion of the building, and not from any express obligation to pay them. Paragraph XXXVII of the complaint alleged that by reason of the defaults previously mentioned, which were defaults in completion, the plaintiff had been deprived of interest on the principal of the loan, not that plaintiff had been deprived of the interest because of the failure of the respondents to comply with an obligation to pay (R. pp. 17, 18).

The Circuit Court of Appeals held that the measure of damages was the difference between the value of the building on the date of the default and the value the building would have had on that date if completed strictly in accordance with the plans and specifications (R. p. 885). No evidence was introduced by the petitioner to show the value of the building on the date of the default, or what the value would have been if the building had been completed on that date in accordance with the plans and specifications.

The Circuit Court of Appeals held that the items of omissions and substitutions claimed by the petitioner might detract from the value of the building (R. p. 882), and that such loss might be recovered (R. p. 884). The petitioner, however, introduced no evidence to show to what extent, if any, the value of the building had been diminished by such omissions and substitutions. On the other hand, the respondents adduced uncontradicted testimony that the value of the building was not lessened by the items of omission and substitution (R. pp. 359, 376, 377, 404).

In the petition (pp. 9 and 10), the petitioner speaks of interest lost by petitioner between December 16, 1930 and October 1, 1931 on $6,575,000. As a matter of fact, petitioner did not lose interest on $6,000,000 between March 17, 1931 and October 1, 1931, because it sold the very same premises for $6,000,000 on March 17, 1931.

As to the Alleged Reasons for Granting a Writ.

The first reason has no substance, because the decision of the Circuit Court of Appeals was in exact conformity with the decision of this Court in *Trainor* v. *Aetna Casualty Co.*, 290 U. S. 47. The only holding of this Court in the case mentioned is that damages were

> "the amount of the difference between the value of the unfinished buildings and their value as it would have been if completed in accordance with the agreement—see *Kidd* v. *McCormick, supra,* p. 398—but exceeding neither the amount due on its debt nor the amount of the bond."

In this case the Circuit Court of Appeals held:

> "We think, therefore, that the measure of damages was the difference between the value of the building on December, 16, 1930, as the work had progressed, and the value it would have had on that day if completed strictly in accordance with the plans and specifications" (R. p. 882).

The second reason has no substance, because the decision of the Circuit Court of Appeals was in exact conformity with the law laid down in *Kidd* v. *McCormick,* 83 N. Y. 391. In that case the Court stated in three different places that the measure of damage was the difference in value

between the buildings unfinished and the buildings as they would have been if completed according to the contract. This is the same measure of damage followed in the *Trainor* case, *supra,* and the same measure of damage applied in the instant case by the Circuit Court of Appeals.

The third reason has no substance, because the cases cited in the petition clearly state that any damages recoverable must not be remote or speculative, but direct and immediate and resulting from the breach alleged. The breach here was the failure to complete a building. The damages claimed, to wit: interest on loan, etc., were lost because of the breach of the borrower in failing to satisfy a mortgage.

The fourth reason has no substance, because, as above pointed out, the Circuit Court of Appeals has followed the decisions in *Trainor* v. *Aetna Casualty Co.* and *Kidd* v. *McCormick.*

The fifth reason has no substance, because there was no finding of fact that interest, taxes and insurance were proper items of damage, but these items were allowed by the Trial Court as a matter of law, based upon a mistaken understanding of the decisions in *Trainor* v. *Aetna Casualty Co.* and *Kidd* v. *McCormick.*

The sixth reason has no substance, because the question is one dependent upon the interpretation of particular instruments and does not involve a question of law of general importance.

The seventh and eighth reasons have no substance, because they present a question which has been passed upon times without number, and that is whether a provision in a written instrument providing for a written waiver may be itself waived by parol.

The ninth reason has no substance, because the amount involved and the length of the trial are not among the reasons laid down for granting a writ of certiorari.

Summary of Argument.

I.

ANSWERING POINT I.

A.

The decisions of *Trainor* v. *Aetna Cas. Co.*, 290 U. S. 47, and *Kidd* v. *McCormick*, 83 N. Y. 391, do not warrant the allowance of interest on a mortgage, taxes and insurance premiums as damages caused by the failure to complete a building.

B.

Interest on the mortgage loan and taxes and insurance premiums are not recoverable as damages from the respondents, because the only default claimed against the respondents, failure to complete the building, was not a cause, either direct, natural, proximate, concurring or otherwise, of the loss by petitioner, but the sole, direct, natural and proximate cause of such loss was the default of the principal debtor on the mortgage.

C.

Interest on the mortgage loan as damages is not recoverable from the respondents because they assumed no obligation as to the principal of the loan, and interest as damages can not be recovered apart from the principal.

II.

ANSWERING POINT II.

The respondents were not liable by contract for interest on the mortgage, taxes and premiums,

because their bond did not guarantee the payment of such items. The respondents' sole obligation was to make good any default of their principal in constructing, paying for and completing the building.

III.

Answering Point III.

Whether the respondents were liable for interest on mortgage, taxes and insurance premiums was a question of law determinable from a construction of the respondents' bond, and the Trial Court made no finding of fact in respect thereof.

IV.

Answering Point IV.

The Circuit Court of Appeals was not confused in its holding that the provision in the bond for written waiver of strict performance of the building loan agreement could be waived by the parol consent of the president of the petitioner to omissions and substitutions.

V.

Answering Point V.

A provision in an instrument requiring a written waiver may be waived by parol, and the excluded evidence tended to show such waiver.

VI.

The Circuit Court of Appeals was correct in ordering a new trial.

ARGUMENT.

I.

Answering Point I.

A.

The decisions of *Trainor* v. *Aetna Cas. Co.*, 290 U. S. 47, and *Kidd* v. *McCormick*, 83 N. Y. 391, do not warrant the allowance of interest on a mortgage, taxes and insurance premiums as damages caused by the failure to complete a building.

The opposition by the respondents in the Trial Court to the allowance of interest on the mortgage loan, taxes and insurance premiums were summarily dismissed by the Court in these words:

> "The defendants' contention would seem adequately to be disposed of under the authorities cited." (Citing the above mentioned cases) (R. p. 507).

No authority was cited to or by the Court in which such items had ever been allowed. The Court depended entirely upon words used in the opinions in those two cases which were not necessary to their decision and were inserted only to show why the measure of damages laid down in those cases and which had always been previously applied was the correct and only measure of damages in such cases.

Difference in value was applied in *Trainor* v. *Aetna*, as the proper measure of damage, this Court saying:

> "Petitioner is entitled to be put in as good position in respect of its debt as it would have occupied if the buildings had been completed in accordance with

> the terms of the undertaking; and this can be done here only by giving it the amount of the difference between the value of the unfinished buildings and their value as it would have been if completed in accordance with the agreement—see *Kidd* v. *McCormick, supra,* p. 398—but exceeding neither the amount due on its debt nor the amount of the bond."

In that case the plaintiff was a third mortgagee with no such rights as the plaintiff here, who was a first mortgagee. Defendant had claimed that the value of the property on the date of default was in excess of the debt to plaintiff and all prior liens and that, therefore, plaintiff could have suffered no damage. To show *why* that contention was not sound, the Court said:

> "Petitioner was then (at the default) without remedy against the property because its mortgage was not in default. It was, therefore, obliged to sit by and await the action of others over which it had no control. In the meantime, the uncompleted buildings necessarily lay unrented, subject to expense in the way of taxes, insurance, accumulating interest, etc., deteriorating in quality and steadily declining in value."

Because of those circumstances the Court held that the plaintiff would be compensated by giving it the difference in value. Clearly, that language is no authority for the proposition contended for by petitioner here. At best, it is a reason why the difference in value is the true measure of damage.

In the *Kidd* case the Court stated the rule to be the same as was followed in the *Trainor* case.

The reasoning used by that Court to show why that was the proper rule of damage was the same reasoning given by this Court in the *Trainor* case.

Since the *Trainor* and *Kidd* cases did not even assume to decide that interest on mortgage, taxes and premiums are proper items of damage in such a case, what the Court might have said arguendo is entitled to no weight.

Cohens v. *Virginia,* 6 Wheat. 264, 399;
Pacific Co. v. *Peterson,* 278 U. S. 130, 136;
People v. *Tax Commissioners,* 174 N. Y. 417, 447.

All the cases relied on in the *Kidd* case, all the cases relied on in the *Trainor* case, and all other decided cases on the point are unanimous that the proper measure of damages *is difference in value at the date of the default, and* that may be shown by proving the *actual cost of completion.*

The *Trainor* case cited with approval *United Real Estate Co.* v. *McDonald,* 140 Mo. 605, 612, in which it was clearly stated that the damages were to be assessed as of the date of the breach of the bond and that the measure of such damage was the difference between the value of the realty without the building required and the value of the property with such building.

To the same effect are:

Longfellow v. *McGregor,* 61 Minn. 494;
Province Securities Corp. v. *Maryland Cas. Co.,* 269 Mass. 75, 94.

Other cases substantially to the same effect are

Phillipe v. *Curran,* 218 Ill. App. 517;
Comey v. *United Surety,* 217 N. Y. 268.

The plaintiff offered no evidence of difference in value.

The petitioner has injected into its argument under Point I a theory which heretofore has not entered into the

case. It is that items of interest, taxes and insurance entered into the determination of difference in values between the building contracted for and the building at the time it should have been completed.

No claim was made either in the pleadings or on the trial that these claimed items of damage entered into the determination of difference in values. The complaint sought interest as damages because the petitioner claimed it had been deprived of interest. Taxes and insurance were claimed and allowed as items of incompletion.

Throughout the trial the respondents claimed that difference in value was the true measure of damage. Petitioner offered no evidence from which the Court could or did find what that difference, if any, was.

For the petitioner now, after its refusal throughout the case to be bound by the difference in value as the measure of damage, to attempt to bring the items claimed within the doctrine of difference in value is to present for the first time a new theory. Neither of the Courts below had presented to it or decided any such question.

Furthermore, as above pointed out, the measure of damage is fixed as of the date of the default. In fixing the damages as of that date, how can interest, taxes and insurance premiums enter into the determination when concededly the petitioner might have let the building lie forever uncompleted? It would be impossible then to determine what the claimed loss of interest, taxes and premiums might be.

Furthermore, petitioner is contending for the right to recover for the cost of incomplete items, the cost of omissions and substitutions, interest, taxes and insurance premiums although the premises as they stood on the date of the default might have been of a value in excess of the amount of its mortgage.

B.

Interest on the mortgage loan and taxes and insurance premiums are not recoverable as damages from the respondents, because the only default claimed against the respondents, failure to complete the building, was not a cause, either direct, natural, proximate, concurring or otherwise, of the loss by petitioner, but the sole, direct, natural and proximate cause of such loss was the default of the principal debtor on the mortgage.

The principal assumed two separate and independent obligations—the repayment of a loan evidenced by a bond and mortgage, and the completion of a building. A default on the first obligation was bound naturally and directly to result in loss of interest on the loan, taxes and insurance premiums. That default would be the sole sufficient, efficient cause of the loss. If there were no default in repayment, a default in completion in no event could result in the losses claimed. And again, the performance of the obligation to complete would not prevent the losses claimed if the obligation to repay were not performed. It is obvious, therefore, that there could be no connection of any kind between the failure to complete the building and the losses claimed.

The failure to complete the building under one obligation could not be the proximate cause of a loss from the failure to repay a loan under another obligation.

Milwaukee, etc. Ry. Co. v. *Kellogg*, 94 U. S. 469, 475;
Laidlaw v. *Sage*, 158 N. Y. 73, 98-102;
Wakeman v. *Wheeler*, 101 N. Y. 205, 209;
McCauslan v. *Zoar*, 131 Misc. 148, 150.

It is fundamental that a plaintiff cannot derive a greater advantage from a breach than from a performance.

Finck v. *Menke*, 31 Misc. 748;
Barnes v. *Brown*, 130 N. Y. 372, 381.

The petitioner seeks interest on a mortgage, because of respondents' failure to complete the building, which it would not have received if the respondents had completed the building.

C.

Interest on the mortgage loan as damages is not recoverable from the respondents because they assumed no obligation as to the principal of the loan, and interest as damages can not be recovered apart from the principal.

Under Point II we show in answer to petitioner's Point II that there was no *contract* obligation upon the respondents to pay interest on the mortgage loan. Here we shall consider the interest *as damages* and establish that there is no liability in respondents to pay the interest as such.

We quote from *Matter of Trustees*, 137 N. Y. 95, 98:

> "Before interest can be allowed in any case it must be by virtue of some contract express or implied, or by virtue of some statute, or on account of the *default of the party liable to pay*, and then it is allowed as damages for the default."

Sutherland on *Damages* (4th Ed.), Secs. 300, 372;
17 C. J. 814;
Cutter v. *Mayor*, 92 N. Y. 166, 170;

Southern Cent. R. R. Co. v. *Moravia,* 61 Barb. 180, 188.

All cases and authorities recognize the distinction between interest payable by virtue of contract and that payable as damages for breach of contract.

Brewster v. *Wakefield,* 22 How. 118;
Holden v. *Trust Co.,* 100 U. S. 72;
O'Brien v. *Young,* 95 N. Y. 428;
Brady v. *Mayor,* 14 App. Div. 152;
Hamilton v. *Van Rensselaer,* 43 N. Y. 244;
Melick v. *Knox,* 44 N. Y. 676.

All of the above authorities and others too numerous to cite hold that in the absence of an express contract to pay interest, interest as damages cannot be recovered apart from the principal of the debt. The interest, being only incidental and accessory, cannot exist without the debt, cannot be separated from the debt and sued for alone.

The case which approaches nearest to the instant case is the *Hamilton* case (*supra*). There the creditor sought to recover interest accruing after the maturity of the principal debt from the third party who guaranteed the interest. Here also the petitioner seeks to recover such interest but from ones who did not guarantee interest. In the *Hamilton* case the creditor sought to recover because of the contract guaranteeing the interest. If in that case interest after maturity had been sought as damages, it would be more akin to our case.

In that case it was held that in no event would the guarantor be liable for interest as damages because "he neither agreed to pay the principal, nor to be liable for the consequences of its non-payment".

United Real Estate Co. v. *McDonald*, 140 Mo. 605; *Province Securities Corp.* v. *Maryland Cas. Co.*, 269 Mass. 75, 94.

II.

Answering Point II.

The respondents were not liable by contract for interest on the mortgage, taxes and premiums, because their bond did not guarantee the payment of such items. The respondents' sole obligation was to make good any default of their principal in constructing, paying for and completing the building.

This claim of the petitioner that the provisions of the respondents' bond obligated the respondents to pay interest on mortgage, taxes and insurance premiums would seem to be controverted by petitioner's own prior, practical interpretation of the instruments. The default in the completion of the building occurred on December 16, 1930. The action herein was instituted on or about February 18, 1932. Between these two dates there were numerous communications between the petitioner and the respondents. Detailed lists of damages claimed were delivered to the respondents by the petitioner. (Plaintiff's Exhibits 60, 62, 66, 70, 71, 72, R. pp. 730, 732, 739, 744, 745, 752.) In none of these communications was any claim made for interest on mortgage, taxes or insurance premiums, nor was any claim made in the complaint that the respondents were obligated by contract to pay interest, taxes or premiums. The long, detailed complaint alleged the only defaults were defaults in constructing, paying for and completing the building. When the concluding paragraph of the complaint claimed

interest, taxes and insurance, it claimed them only because they were damages flowing from the failure to complete the building, not flowing from the failure to comply with an obligation to pay such items (R. pp. 13-18).

Under the circumstances, it is hardly open to the petitioner to claim that there was any written obligation on the part of the respondents to pay such items. But apart from the practical construction placed upon the respondents' bond by the petitioner, the only reasonable construction of the instruments in suit is that respondents were not liable by contract for the payment of interest, taxes and premiums.

All the instruments in suit which evidenced the relations between plaintiff and Central Park Properties, Inc., show clearly that the latter assumed two separate obligations; first, the repayment of the principal of a loan in the sum of $6,650,000, with interest; second, the construction and completion of a building in accordance with the terms of the building loan agreement and plans and specifications.

That the petitioner fully understood that there were two separate obligations is shown by the fact that it sought and obtained a guaranty of performance of the bond and mortgage from one Lefcourt (R. pp. 571, 578, 679).

Lefcourt's guaranty covered both of the obligations mentioned,—payment of principal and interest and completion of the building,—while the surety bond executed by these respondents covered only the latter obligation, the completion of the building.

Lefcourt's collateral bond (Plaintiff's Exhibit 10) in express terms guaranteed the performance of the provisions of the bond and mortgage, including payment of principal and interest.

When we now turn to the respondents' bond (Plaintiff's Exhibit 2) we notice the absence of any language like the language used in the Lefcourt guaranty for the payment of principal and interest and for the performance of the bond and mortgage.

The condition of the bond was that it will be void: if the principal shall proceed with the *construction and completion of the building* so that it shall be constructed and completed in accordance with the building loan agreement and the plans and specifications, and ready for occupancy not later than December 16, 1930, free and clear of liens (among which is not plaintiff's mortgage) (R. pp. 595, 596); if the principal shall pay the cost of the *erection, construction and completion* (R. p. 596); if the surety shall indemnify the obligee from *loss or damage caused by the failure to construct, pay for and complete the building* (R. p. 596); if the surety shall make good any default *in constructing, paying for and completing* the building and shall make good every other default by the principal in performing any of the other terms set forth *in the building loan agreement* to be kept and performed by the principal up to and including the completion of and payment for the building in accordance with the building loan agreement and plans and specifications, and shall indemnify the obligee against loss and damage suffered by the obligee in making good any default of the principal (R. pp. 596, 597).

There is no condition express or implied respecting payment of the principal of or the interest on the loan, taxes or premiums. The building loan agreement specifically provided that the bond was to guarantee the completion of the building, not the payment of principal or interest of the loan, taxes or premiums. The recital in the bond itself

is that it was to guarantee the completion of the building, not the performance of the bond and mortgage.

As said in *United Real Estate Co.* v. *McDonald,* 140 Mo. 605, cited with approval in *Trainor* v. *Aetna Casualty,* 290 U. S. 47:

> "The condition of the bond is not that McDonald's notes should be paid but that the house should be built."
>
> *Province Securities Corp.* v. *Maryland Cas. Co.,* 269 Mass. 75, 94;
> *McCauslan* v. *Zoar Holding Co.,* 131 Misc. 148, 150.

It is well settled that the obligation of the surety is not to be extended to any other subject, person or period of time or liability than is expressed or necessarily included in it.

> *Smith* v. *Molleson,* 148 N. Y. 241, 246;
> Sutherland on *Damages* (4th Ed.), Sec. 725.

Reading the building loan agreement and the bond together, only one reasonable conclusion is possible and that is that the respondents' bond was a guaranty only of the completion of the building. That is exactly what both the building loan agreement and the bond said.

Petitioner has apparently now discarded the argument made by the Trial Court for the inclusion of interest, taxes and insurance premiums in the damages, and argues that these items were payable because of provisions other than those relied upon by the Trial Court.

Its first argument is, in brief, that since the respondents' bond agreed to make good any default by the principal in performing any of the terms, covenants or conditions of the building loan agreement, and the principal in the building loan agreement agreed to perform the cove-

nants, terms and conditions of the bond and mortgage, the respondents thereby became liable for the performance of the covenants, terms and conditions contained in the bond and mortgage. If such construction were possible, then the respondents would have been liable for the principal of the loan up to the amount of their bond, although the amount of the bond was less than half of the amount of the loan and was given for the purpose of guaranteeing the completion of the building. If the petitioner intended to make the respondents liable for the performance of the bond and mortgage, it should have used explicit language to that effect. When petitioner sought a guaranty not only of the provisions of the building loan agreement but of the provisions of the bond and mortgage from Lefcourt, it did so without any uncertainty in language. Lefcourt guaranteed the performance of the provisions of all these instruments. The respondents guaranteed only the performance of the provisions in the building loan agreement.

What the petitioner is endeavoring to do is to import into the building loan agreement the covenants and provisions of the bond and mortgage, so as to make the respondents liable for the performance of the provisions of the bond and mortgage, when they agreed only to be bound for the performance of the provisions of the building loan agreement.

As to insurance, the petitioner relies on part of Paragraph Fourteenth of the building loan agreement. Although the petitioner states that this provision requires the principal to pay premiums, it does nothing of the kind, as an examination of the paragraph will disclose. The paragraph simply requires the borrower to place all insurance through a designated insurance broker (R. pp. 580, 581).

As to taxes, petitioner claims that the respondents' bond guarantees completion free from all liens, that taxes are a lien, and that, therefore, respondents are obliged to pay the

taxes. Again the petitioner has failed to call the Court's attention to the whole of the provision relied upon. The provision apparently relied upon is contained in the condition of the bond providing for the completion of the building "free and clear of and from any and all mechanics' or material men's liens or other liens, claims of architects, conditional sale contracts, chattel mortgages and charges for work and labor performed or for materials, machinery, fixtures, refrigerating units, appliances, or equipment used, or installed in or about the said building, and any municipal violations against said premises and the improvements thereon" (R. p. 596). It is apparent that the liens referred to are liens arising out of the performance of the work necessary for the completion of the building. Under well settled rules of construction the "other" liens spoken of are liens of the same nature as the specific liens mentioned.

Bers v. *Erie R. R. Co.*, 225 N. Y. 543, 546;
Matter of Hermance, 71 N. Y. 481, 487.

III.

Answering Point III.

Whether the respondents were liable for interest on mortgage, taxes and insurance premiums was a question of law determinable from a construction of the respondents' bond, and the Trial Court made no finding of fact in respect thereof.

Petitioner makes the unwarranted statement on page 31 that respondents on the trial did not dispute the fact that these items were damages contemplated to result from a failure to complete the building. A reading of the Trial Court's opinion will show that the respondents bitterly contested the contention.

No evidence was adduced by the petitioner in respect of these items other than that it received no interest on

the principal of the loan from the date of the default; that it paid taxes covering the period after the date of the default; and that it paid insurance premiums for the same period.

The petitioner claims that when the Trial Court found from a consideration of the instruments that the respondents were liable for these items, thereby the Trial Court made a finding of fact, with evidence to support it. Obviously, a conclusion reached from the construction of written instruments is not a determination of fact. The construction and effect of written instruments is a question of law.

Swift v. *Hocking Valley R. Co.*, 243 U. S. 281, 289;
Dillon v. *Barnard*, 21 Wall. 430, 437;
Hamilton v. *Liverpool, etc. Ins. Co.*, 136 U. S. 242.

Therefore, the cases cited by petitioner which hold that the direction of a verdict is conclusive upon all issues of fact have no application. Necessarily, before such cases could have application, there would have to be a dispute of fact as to these items, and the only dispute was one of law based upon the interpretation of the written instruments.

The claim that the parties must have had in mind cases where interest on investment may be considered for the purpose of arriving at a fair return on the money is without force.

In this case the petitioner kept as far away as possible from a determination of the value of the property and a determination of the capital investment in the property for the purpose of determining loss. Even assuming that interest and taxes might enter into a determination of the investment of the petitioner, if the value of the property was equal to the amount of that investment, the petitioner

could under no circumstances recover damages. Respondents did not guarantee anything other than losses sustained. Therefore, the talk about capital investment and the items entering into capital investment, when there is nothing in the record to show loss of capital investment, is to inject matters which were never before considered.

Again the claim is made that the parties must have contemplated that when the building was erected it would rent for more than enough to pay interest, taxes and premiums. It is sufficient to say in respect of rent and rentability that such questions were not in this case, as was pointed out by the Circuit Court of Appeals in its opinion (R. p. 884).

IV.

Answering Point IV.

The Circuit Court of Appeals was not confused in its holding that the provision in the bond for written waiver of strict performance of the building loan agreement could be waived by the parol consent of the president of the petitioner to omissions and substitutions.

If we understand the argument of petitioner, it is that the evidence excluded tended to show a waiver of the provisions of the building loan agreement, and did not tend to show a waiver of the provision in the bond that any waiver of the provisions of the building loan agreement must be in writing, and that, consequently, when the Circuit Court of Appeals stated that the evidence excluded would tend to establish a waiver of the requirement in the bond for a written waiver, it misconceived the instrument which

it is claimed was changed. This argument seems to lose sight of the fact that evidence competent to establish a waiver of strict performance of the building loan agreement would be competent to establish a waiver of strict performance of the bond of the respondents, because the bond guaranteed the performance of the provisions of the building loan agreement.

The theory upon which the petitioner sought damages for omissions and substitutions was that the principal had made these omissions and substitutions contrary to the terms of the building loan agreement. Respondents pleaded in their answer that the omissions and substitutions claimed as items of damage were made with the knowledge and approval of the petitioner, and that as to such items there was a waiver of strict performance of the building loan agreement (R. p. 55).

The building loan agreement specifically recognized that there might be a waiver of the strict performance of the building loan agreement when it provided that the failure to require strict performance in any one or more instances of the terms of the building loan agreement should not be construed as a waiver for the future of any such terms (R. p. 55). There was no provision in that agreement requiring any such waiver to be in writing. However, there was a provision in the respondents' bond to the effect that any waiver of a default in complying with the building loan agreement, the plans or specifications, or the bond itself should be in writing signed by an officer (R. p. 604).

Naturally, if a waiver of strict performance could have been established, no liability would attach against the respondents for omissions and substitutions consented to, because their bond did not impose any greater liability upon them than was imposed upon their principal. Whatever acts of the petitioner would relieve the principal of liability

under the building loan agreement would likewise relieve the respondents of liability under their bond as to the same matters.

Upon the trial the respondents endeavored to adduce testimony that the president of the petitioner consented by parol to certain omissions and substitutions. As stated above, such consent, if effective, would accomplish a change in the principal's obligations under the building loan agreement and the respondents' obligations under the bond. Objection was made to the offer of proof because the consent or waiver to be proved was a parol one and not in writing, as provided by the bond. The testimony was excluded because of that specific objection, the Court holding that a parol consent or waiver could not be established (R. pp. 213, 214).

Strictly speaking, the evidence excluded was offered to establish a waiver of strict performance of the building loan agreement. That is the very fact which the respondents would have to establish in order to avoid liability on account of omissions and substitutions. Proof of a waiver of the provision that waivers should be in writing in and of itself would be ineffective without proof of a waiver of the building loan agreement.

The objection to the testimony offered was not the objection now raised, that it would not tend to show a waiver of the provision of the bond, but the objection was that a waiver of the provisions of the building loan agreement could not be proven by parol.

We are uncertain whether petitioner argues that the provision for written waiver had greater weight because it was contained in the bond rather than in the building loan agreement. If so, the argument would seem to be without weight. If the provision for a written waiver had been in the building loan agreement and not in the bond, the respon-

dents would have been bound by such provision in the same manner as they were bound by all the other provisions in the building loan agreement. If such a provision in the building loan agreement could be waived, the same provision in the bond could be waived.

V.

Answering Point V.

A provision in an instrument requiring a written waiver may be waived by parol, and the excluded evidence tended to show such waiver.

The respondents upon the trial endeavored to show that the president of the petitioner was familiar with certain omissions and substitutions and consented thereto. Objection was made upon the ground that there could be no waiver except in writing, and the Court sustained the objection (R. pp. 213, 214). No objection was made that there was no preliminary showing of the general authority of the president or that the testimony sought to be adduced would not tend to show a waiver, the objections now advanced for the first time. Objection was based solely upon the ground that there could be no parol waiver, and respondents were prevented from proceeding further because of that objection.

We submit that the Trial Court misconceived the law and that the Circuit Court of Appeals was correct in its determination that even a provision against parol waiver might itself be waived. All recognized authority is to the effect that a provision requiring any waiver to be in writing may itself be waived by parol. As Judge Cardozo said in *Beatty* v. *Guggenheim Exploration Co.*, 225 N. Y. 380, 387:

"Those who make a contract, may unmake it. The clause which forbids a change, may be changed like any other. The prohibition of oral waiver, may itself be waived. 'Every such agreement is ended by the new one which contradicts it.' (*Westchester F. Ins. Co.* v. *Earle*, 33 Mich. 143, 153). What is excluded by one act, is restored by another. You may put it out of the door; it is back through the window. Whenever two men contract, no limitation self-imposed can destroy their power to contract again (*Pechner* v. *Phoenix Ins. Co.*, 65 N. Y. 195, 204, 205; *Solomon* v. *Vallette*, 152 N. Y. 147, 151; *F. F. Ins. Co.* v. *Norwood*, 69 Fed. Rep. 71; *McElroy* v. *B. A. Assur. Co.*, 94 Fed. Rep. 990; *Westchester F. Ins. Co.* v. *Earle, supra;* Ewart on the Law of Waiver, p. 286)."

Insurance Co. v. *Norton*, 96 U. S. 234, 240;
Northern Assurance Co. v. *Grand View, etc. Assn.*, 183 U. S. 308, 352, 361;
Teer v. *George A. Fuller Co.*, 30 F. (2d) 30, 32;
Steen v. *Niagara Fire Ins. Co.*, 89 N. Y. 316, 327;
General Electric Co. v. *National Contracting Co.*, 178 N. Y. 369, 375.

In the very *Traitel Marble* case cited by petitioner, which had to do with alterations in the work, and in which there was a written provision that no alterations should be made except upon written order, the Court stated:

"Unless compliance therewith was waived by the defendant, the provision that there should be no change in the work as fixed by the specifications, except upon the written order of the architect, was controlling (*Langley* v. *Rouss*, 185 N. Y. 201). *Such waiver might have been by writing or by conduct.*"

When petitioner quoted from *Langley* v. *Rouss*, 185 N. Y. 201, it failed to quote that part of the opinion which

is applicable here. That case pointed out the difference in a contract which limits the authority of the architect and a contract providing that the contractor shall not be paid for alterations unless the same are ordered in writing by the owner. As to the latter type of contract, the Court said:

> "A party to a building or other contract can waive a provision therein inserted for his benefit."

VI.

The Circuit Court of Appeals was correct in ordering a new trial.

The petitioner makes the point that the only fact which would require a new trial was the exclusion of evidence, and that if such exclusion was proper no new trial was required.

Without arguing the point as to when the Circuit Court of Appeals may make a final determination, it is obvious from a reading of the opinion of the Circuit Court of Appeals that a new trial was absolutely necessary in order that any damages might be fixed in accordance with the proper rules.

The Circuit Court of Appeals held that the proper measure of damages was the difference in value between an incomplete and complete building (R. p. 882). No evidence was offered at the trial to show what that difference, if any, was.

The Circuit Court of Appeals held that recovery might be had for any loss sustained by reason of omissions and substitutions, but that such loss would be the amount by which the value of the building was lessened (R. pp. 882, 884). There was no evidence offered upon the trial to show that there was any such loss, although the respondents

offered evidence that the omissions and substitutions did not decrease the value of the building. Under the circumstances, before petitioner could recover for omissions and substitutions, it would have to adduce testimony to show decrease in value of the building.

The items of omissions and substitutions were of importance, as shown by the fact that the Trial Court allowed as damages $160,842.28 for omissions and substitutions (R. p. 516). Since these items were never installed or corrected, it would have been improper to allow recovery therefor by showing what it would have originally cost to install them in the manner required. The true measure of damage is, as pointed out by the Circuit Court of Appeals, the decreased value of the building by reason of such omissions and substitutions and there is no evidence in the record of such decreased value.

Conclusion.

The petition should be denied.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1935.

THE PRUDENCE COMPANY, INC.,
Petitioner,

against

FIDELITY & DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE,
Respondents.

No. 270.

BRIEF FOR RESPONDENTS.

THOMAS E. WHITE,
Counsel for Respondents.

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Supreme Court of the United States

October Term, 1935.

THE PRUDENCE COMPANY, INC.,
Petitioner,

against

FIDELITY & DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE,
Respondents.

No. 270.

BRIEF FOR RESPONDENTS.

Scope of Review.

This Court has granted certiorari to consider the measure of damages to be applied in an action brought by a mortgagee (here the petitioner) against sureties (here the respondents) on the bond of the latter guaranteeing completion of a building, for damages arising out of failure to complete the building, where the principal-mortgagor has also defaulted on the mortgage.

Damages Claimed by Petitioner.

The petitioner did not ask generally for damages, but asked specifically for three items of damage: First, expenditures alleged to have been made by it in completing the building though the greater part of the alleged period used for completion was after petitioner had become owner

of the premises by purchase on foreclosure sale and though included in the alleged expenditures were taxes and insurance premiums covering part of the said alleged period, which did not become payable and were not paid until after petitioner had become owner; Second, the amount by which the value of the building had been lessened by omissions and substitutions therein; Third, alleged loss of interest on the unpaid principal of its loan during the alleged period used for completion, both before and after it had become owner by purchase (R. pp. 13, 14, 17-19).

Statement of the Case.

As petitioner has omitted to state many matters essential to the determination of the questions before the Court, we believe a more complete statement of the case is advisable and necessary.

On September 6, 1929, petitioner in writing accepted an application for a loan of $6,650,000 made by Central Park Properties, Inc., hereinafter referred to as "principal" (Defendant's Exhibit A, R. pp. 792-805). The acceptance provided that the principal would execute and deliver a bond and first mortgage, the latter of which should be a valid first lien upon the premises in question (R. p. 793). It was further provided that "payment of principal and interest on said bond and mortgage when due * * * shall be guaranteed by Abraham E. Lefcourt" (R. p. 795). Provision was further made for the erection of a new building upon the premises and that the principal would furnish a surety bond "guaranteeing to us completion of said building" in accordance with plans and specifications (R. p. 797). A representation was made by the principal, the truth of which made the acceptance conditional and which has never been doubted, that the principal

had paid for the land in 1928 the sum of $4,000,000 (R. p. 798). It was provided that the first advance by petitioner at the closing would be in the sum of $3,250,000 from which all fees and other disbursements should be deducted (R. p. 794). A building loan agreement was to be executed at the time of closing (R. p. 801).

On September 24, 1929, the building loan agreement was executed (Plaintiff's Exhibit 1, R. pp. 567-590), whereby the purposes for the loan were recited as being "*to aid the Borrower in discharging existing mortgages,*" in paying the fees of the petitioner, in erecting a building and in paying "*part of the purchase price of said land*" (R. p. 567). It provided that the loan would be evidenced by a bond and mortgage of the principal (R. p. 568). It then specifically provided, as the building loan acceptance had provided, that "the payment of principal and interest on said bond and mortgage, as and when the same shall become due * * * and the performance by the Borrower of all the covenants and agreements herein contained, shall be guaranteed * * * by Abraham E. Lefcourt" (R. p. 571). A building was agreed to be erected by the principal according to plans and specifications and as described in Schedule B attached to the agreement (R. pp. 577, 587). A provision as to a surety bond, similar to the provision in the loan acceptance, provided that the principal would furnish such bond in the sum of $3,000,000 "conditioned upon and guaranteeing completion of said building" (R. p. 578). The building loan agreement was petitioner's regular printed form, but the printed provision therein that a surety bond should be furnished "in the amount of this loan" was changed to read "in the amount of $3,000,000" (R. p. 578) indicating that the loan was for other purposes than for building.

The principal agreed to pay petitioner a fee of $400,000 for the loan which was to be and was deducted from the first advance of $3,250,000 (R. pp. 581, 583). All advances after the first one were to be made on the basis of 75% of the value of the labor and materials installed (R. pp. 583, 584).

The amount of the surety bond and the amount of the advances to be made for the erection of the building show an explicit understanding that a great part of the principal of the loan would be satisfactorily secured by the land alone which had cost the principal $4,000,000 (R. p. 798) and that the building would be security for only part of the loan.

Petitioner was authorized to apply part of any advance in payment of interest and taxes (R. p. 576). Petitioner acted on this authorization and concededly on the date of the maturity of the bond and mortgage, being the same date for the completion of the building, there were no unpaid interest or taxes.

As provided by the loan acceptance and by the building loan agreement, Lefcourt executed a "guaranty on loan" whereby he guaranteed that the principal would complete the building in accordance with the building loan agreement and the plans and specifications within the time specified and further guaranteed "that said borrower will complete and perform all the other terms and conditions of said agreement on its part to be performed and to make all payments on its part required to be made under said agreement *together with payment of principal and interest on the bond and mortgage* mentioned in said agreement until completion of said building" (R. pp. 678, 679). The guaranty further guaranteed the punctual payment of the principal sum and interest on the bond and mortgage as

the principal and interest become due and the faithful performance by the mortgagor of all the terms and conditions thereof (R. p. 680).

The respondents executed a surety bond as provided by the loan acceptance and the building loan agreement on the printed form of petitioner (Plaintiff's Exhibit 2, R. pp. 591-619). The surety bond recited that a building loan agreement had been made which provided for a loan "to be secured by the bond and first mortgage of the Principal" (R. p. 592); that the principal had agreed, "*among other things*", to complete a building; that the principal was about to execute and deliver to the petitioner its bond and first mortgage in the sum of $4,150,000 and that the principal and petitioner had entered into or were about to enter into an agreement consolidating four other mortgages on which there was unpaid principal of $2,500,000 with the mortgage executed by the principal to petitioner into a single first mortgage of $6,650,000 (R. p. 594); that the principal agreed to deliver to petitioner a surety bond in the sum of $3,000,000 "conditioned upon and guaranteeing completion" of the building in accordance with the building loan agreement and the plans and specifications (R. p. 594).

The condition of the respondents' bond was that it would be void if the principal did complete and pay for the building within the time specified and in accordance with the plans and specifications; if the respondents should indemnify the petitioner from all loss or damage by raeson of failure of the principal to pay for and complete the building; and if the respondents should make good any default in paying for and completing the building and "shall make good any and every other default by the principal in performing any of the other terms, covenants or conditions in said building loan agreement set forth by the principal to

be kept and performed up to and including the completion of the building" (R. pp. 596, 597). This quoted condition is somewhat similar to the provision in Lefcourt's guaranty (R. p. 697). But there is deliberately left out of this condition the provision contained in Lefcourt's guaranty "together with payment of principal and interest on the bond and mortgage mentioned in said agreement" (R. p. 679). This difference between the language of the respondents' surety bond and the language of Lefcourt's guaranty is very material in considering petitioner's claim that the respondents, as well as Lefcourt, are liable for interest on the bond and mortgage although respondents' surety bond contains no express provision therefor, whereas there is express provision therefor added to almost similar language in the Lefcourt guaranty.

After the execution of the building loan agreement the principal proceeded with the erection of the building and from time to time received advances from petitioner. On October 3, 1930, the Building Department of the City of New York had issued a certificate of occupancy (R. pp. 712-717). On October 6, 1930, the principal submitted a requisition to the plaintiff requesting payment of the final advance of $820,000 (R. p. 710). On that requisition the principal's total cost of erection as of September 22, 1930, was shown to be $4,150,487.56, stated to be an increase in the cost of the work of $693,562.04 over the amount estimated to be sufficient by the principal. The amount of the loan allocated by petitioner to erection was $3,400,000.

The petitioner refused to make the final advance at that time. Later, however, the petitioner's vice-president in charge of the matter agreed to make a complete inspection of the building to determine the estimated cost of completion (R. p. 384). Accordingly over a period of two weeks

the building was inspected (R. pp. 432, 433) and based upon that inspection and previous reports and inspections of petitioner's inspectors (R. pp. 805-813), petitioner's vice-president stated that $75,000 would be sufficient to complete the building (R. p. 385). If the Court will compare this estimate with the petitioner's final claim for items of incompletion (R. pp. 758-762), and deduct taxes, $57,120, and other items therein which are not true items of incompletion, it will see that the estimate was fairly accurate.

On December 5, 1930, petitioner made a final advance of $300,000 and executed a certificate stating that the principal had deposited with it the sum of $75,000 to be held until the work of completion was done (R. p. 757).

This $75,000 was later used to reduce the mortgage principal (R. p. 12).

On December 16, 1930, the principal defaulted on its mortgage and on December 18, 1930, one Harrigan, claimed by the petitioner to be its nominee, started foreclosure action (R. pp. 19, 20). On about January 6, 1931, the principal signed an agreement giving petitioner possession of the premises (R. p. 725). Judgment of foreclosure and sale was entered on January 19, 1931; the property was sold on March 17, 1931, for $6,000,000 and a deficiency judgment of $716,215.02 was entered on April 30, 1931 (R. pp. 19, 20).

It is interesting to compare the sale price on foreclosure, $6,000,000, with the cost of the land and building to the principal up to September 22, 1930—$4,000,000 for the land in 1928 (R. p. 798), and the cost of erection $4,150,487.56. Furthermore, work continued on the building for approximately three months after September 22, 1930, necessarily entailing further cost to the principal.

In the foreclosure action Abraham E. Lefcourt was joined as a party defendant (R. p. 19), presumably solely

because of the execution of his guaranty of the payment of principal and interest on the mortgage.

No attempt was made in that action to claim against the respondents for principal or interest on the mortgage and they were not made parties to that action although under the New York practice any party liable for any part of the mortgage debt may be joined as a defendant (N. Y. Civil Practice Act, Sec. 1079).

At no time after December 16, 1930, and before February 14, 1931, did the petitioner inform the respondents of the mortgage default or the alleged default in completing the building, although on January 7, 1931, one of the respondents wrote to the petitioner stating that it assumed the building had been completed and asked for advice on the subject (R. p. 726).

On February 14, 1931, two months after the alleged default, for the first time did the petitioner indicate to the respondents that the building had not been completed (R. p. 730).

Although petitioner wrote to respondents in respect to its claims upon them on February 25, 1931, March 31, 1931, April 11, 1931, June 9, 1931, June 10, 1931, June 24, 1931, and July 6, 1931, the petitioner did not claim that respondents were responsible for interest on the bond and mortgage (R. pp. 732-754). In the letter of June 9, 1931, petitioner stated that because the building was not completed on December 16, 1930, it had sustained further substantial loss, the amount of which had not yet been computed, but that it would notify respondents of such additional loss and damage as soon as it was calculated (R. p. 746). The only further claim for such damage was contained in the letter of July 6, 1931 (R. p. 752). In that letter it asked that the amount of the then enclosed claim be added to the

previous claim filed so as to make a total final claim of $417,638.78 (R. p. 752) and no claim for interest was made.

In its complaint, February 18, 1932, petitioner for the first time claimed for interest on the mortgage. It is there claimed as special damage that by reason of the default in completing the building petitioner was deprived of any interest or return on the principal of the loan (R. pp. 17, 18). There was no demand made for general damage. The only evidence given upon the trial respecting loss of interest was the statement of petitioner's vice-president that it had not received any interest from the borrower after the default (R. p. 337).

There was not a scintilla of evidence offered to show that if the building had been completed it would have given any return. The claim for interest was based solely upon the fact that the principal did not pay interest on the loan after December 16, 1930.

Petitioner's complaint, offered in evidence, shows that $6,000,000 was bid and paid for the property on the foreclosure sale (R. p. 20). Petitioner, instead of investing that $6,000,000 in some other manner, re-invested it in this particular property. Yet the petitioner had the boldness to claim interest on its total loan throughout the period used in completion even after $6,000,000 had been repaid to it out of the proceeds of the foreclosure sale.

Not only was there no evidence that loss of return on petitioner's investment was caused by the default, there was even no evidence that there had been no return on such investment. It appears that part of the building was actually tenanted in August, 1931 (R. p. 480), two months before the alleged date of completion. To what extent the building was tenanted and what rents were received, was not shown and since petitioner did not attempt to prove lack of financial return on the property there was nothing for respondents to rebut.

Petitioner claimed interest to October 1, 1931. The only evidence given as to a reasonable time within which to complete the building was adduced by respondents and was that it would have taken between 4 and 8 weeks (R. pp. 435, 436). Petitioner rested its case on this point upon the statement of its vice-president, who was not a builder and had nothing to do with the completion, that the building was not actually completed until October 1, 1931 (R. p. 111). Petitioner now claims in the note on page 10 of its brief that the time taken must have been reasonable because the cost of completing was testified to be reasonable. The reasonableness of time was capable of direct proof.

Furthermore, during this same period to October 1, 1931, very material alterations were made in the building to suit petitioner's fancy. Petitioner's own supervisor testified as to them and stated that four months was consumed in making them. Work already done, not defective, was undone and new work, entirely uncalled for by the plans and specifications, was done in its place. The basement and ground floors were completely rearranged, the kitchen being taken from the basement to the ground floor. Wood floors were installed in about 60% of the building. Gas ranges were installed in all apartments (R. pp. 244-246).

In addition, there was testimony by petitioner's witness that moulding, installed in the living quarters, was removed and painting done instead, and rooms and corridors were papered which had been painted (R. pp. 276, 282).

In addition to the claim for loss of interest, petitioner claimed damages for alleged items of incompletion which it installed, omissions which it did not supply and substitutions which it did not correct. The items of incompletion are contained in its revised schedule, Plaintiff's Exhibit 84 (R. pp. 758-762).

Among the claimed items of incompletion are taxes for 1931 (R. p. 762), which did not become due, were not a lien and were not paid until after the sale of the property on foreclosure (R. pp. 111, 112). Included also were insurance premiums covering the period after the foreclosure (R. p. 760).

The items of alleged omission and substitution were grouped in the one schedule, Plaintiff's Exhibit 85, revising Schedule B annexed to the complaint (R. pp. 763-766). The complaint alleged that because of the omissions and substitutions "the value of the said building has been materially lessened" in the total of the schedule (R. p. 17).

Upon the trial no evidence was offered by petitioner to substantiate the allegation of its complaint that the value of the building had been lessened by the omissions and substitution. On the other hand, the respondents adduced direct, positive testimony, uncontradicted, that the value of the building had not been lessened by the alleged omissions and substitutions (R. pp. 359, 376, 377, 404).

There is absolutely no foundation for the statement in the second note on page 7 of petitioner's brief that the omissions and substitutions detracted from the value of the building. The pages cited as authority for such statement contain no evidence that the value of the building was lessened.

The only evidence offered by petitioner, as to the omissions, was that the reasonable cost of supplying them was that stated on Plaintiff's Exhibit 85 (R. pp. 235, 236, 468). As to the substitutions the petitioner sought the difference between what the principal paid for the items and what it would have had to pay to comply with the specifications. It is shown by the Plaintiff's Exhibit 85 itself that most of the expensive items were those in which claim was made for the

difference between what was spent by principal and the amount mentioned in the specifications (R. pp. 763-766). The specifications contained certain so-called cash allowances to be included in a contractor's estimate for bidding purposes (R. pp. 661, 662). These specifications were dated May 31, 1929 (R. pp. 655, 662), and according to petitioner's own witness the amounts mentioned in the specification were a mere estimate and the items might cost more or less, depending upon conditions (R. pp. 189, 190, 198-201, 203).

The claim made in Petitioner's Foreword (p. 19 brief) that the protection of petitioner's capital investment was the reason for the respondents' bond is not entirely correct. The loan was for $6,650,000. Respondents' bond was for $3,000,000. The land alone had originally cost $4,000,000 (R. p. 798). The petitioner advanced $3,250,000 on the security of that land before the principal had incurred one iota of expense for the erection of the building (R. pp. 794, 583). Under the cicrcumstances it is extravagant to claim that the sole security for petitioner's investment of $6,650,000 was the building and respondents' bond.

The same may be said for the similar claim on page 46 of petitioner's brief that what was secured by respondents' bond "was petitioner's investment ($6,575,000) with interest thereon".

Although the petitioner has attempted, in the note at page seven of its brief, to inject equities favorable to it into the case by stating that "the record shows that after Prudence Company had accepted the loan and made its first advance of $3,250,000 the plans and specifications were secretly, deliberately, intentionally and materially changed (R. pp. 192, 345)", it is worthy of note not only that the record nowhere justifies the epithets used by the petitioner

to characterize the nature of the changes in the plans and specifications, but that the respondents produced evidence that the building was in fact increased in value by additions to and improvements upon the original plans and specifications by the principal, and would have shown what the value or cost of the additions and improvements was had they been permitted to do so by the Trial Court (R. pp. 348-353, 377).

The Opinion of the Circuit Court of Appeals.

The Circuit Court of Appeals stated that the petitioner was entitled to a completed building for security only (R. p. 880) and held that the measure of damages for failure to complete was the difference between value on the date of the default and what the value would have been on that date if the building had been fully completed (R. p. 882). This was in accord with *Kidd* v. *McCormick*, 83 N. Y. 391, and *Trainor* v. *Aetna Casualty & Surety Co.*, 290 U. S. 47. Following *Kidd* v. *McCormick* (*supra*), the court in effect held that if the petitioner desired it could use the cost of completion as the amount and measure of its damage (R. p. 880). It also held that in addition to the items completed, petitioner might recover for omissions and substitutions if these latter items detracted from the value of the building (R. p. 882). As pointed out above, there was no evidence that such latter items did detract from the value of the building.

Presumably because the petitioner offered no evidence bearing on difference in value other than evidence regarding items of completion and of substitution and omission, the court stated that upon the new trial the rule of cost of completion would be the guide, and that, in addition to

items of incompletion which were completed by petitioner, it might adduce evidence to show loss due to items of omission and substitution (R. p. 884).

The court held, after reviewing the provisions of the agreement between the parties, that the petitioner was not expressly or impliedly entitled to recover interest on the mortgage, taxes and insurance premiums during the period for completion of the building according to the building loan agreement (R. pp. 883, 884). Furthermore, the court held, again in accord with *Kidd* v. *McCormick* (*supra*) and *Trainor* v. *Aetna Casualty & Surety Co.* (*supra*), that under the rule that damages were to be measured by the difference in value of the property with the building completed and uncompleted, damages for default in completion could not be measured by interest, taxes or insurance during the period necessary for completion (R. p. 884). As to whether or not rental value during the period necessary for completion could be considered in computing difference in value, the court stated:

> "Since the complaint does not plead and no proof has been received showing loss of rent during the period of incompletion, we need not decide whether or not this appellee might have had a loss of profits because of failure to have a completed building after its entry and possession of the premises. See: Provincetown Securities Corp. v. Maryland Casualty Co., 168 N. E. (Mass.) 257." (R. p. 884).

POINT I.

The measure of damages in such a case as this is the difference between the value of the uncompleted building on the date of the default and its value if it had been completed.

This is not the first case which has passed upon the damages to be awarded to a mortgagee to whom a bond of completion has run. Both this court in *Trainor* v. *Aetna Casualty Co.,* 290 U. S. 47, and the New York Court of Appeals in *Kidd* v. *McCormick,* 83 N. Y. 391, have considered and laid down the general rule for the measurement of damages in such a case.

The earlier *Kidd* case, three times in its opinion, stated that the damages are the difference between the value of the uncompleted building and the value it would have had if completed (pp. 395, 397, 398). The court held that that difference in value might be shown in three ways. The first way was by evidence of experts as to the difference in value. In this case the petitioner did not rely upon that type of evidence and gave no such evidence. The second type of evidence which could be used in a proper case under the *Kidd* case would be evidence of experts as to what it would cost to complete the building up to the mark of the contract. We contend that such evidence could not be used after the building had been completed and actual cost shown, nor did petitioner attempt to use this type of evidence.

The third type of evidence approved by the *Kidd* case is evidence of what the actual cost of completion was. In this case the last type of evidence was used by petitioner. But since the petitioner claimed that the building as finally completed by it did not come up to the mark of the contract by

reason of omissions and substitutions, it sought damages not only for the amount expended by it in completion but on account of such omissions and substitutions as well. As to such omissions and substitutions, we contend that under the *Kidd* case and other New York cases applying the rule of that case the damages recoverable for such omissions and substitutions are represented by the decrease in the value of the building caused by them. That is the very theory upon which petitioner proceeded in its complaint (R. pp. 13, 14). But upon the trial it gave no evidence whatsoever of any decrease in value because of such omissions or substitutions.

This court in *Trainor* v. *Aetna Casualty Co.* (*supra*), applied the rule laid down in *Kidd* v. *McCormick,* and used the following language:

> "Petitioner is entitled to be put in as good position in respect of its debt as it would have occupied if the buildings had been completed in accordance with the terms of the undertaking; and this can be done here only by giving it the amount of the difference between the value of the unfinished buildings and their value as it would have been if completed in accordance with the agreement—see *Kidd* v. *McCormick, supra,* p. 398—but exceeding neither the amount due on its debt nor the amount of the bond."

In *United Real Estate Co.* v. *McDonald,* 140 Mo. 605, 612, cited with approval in *Trainor* v. *Aetna Casualty Co.,* it was held that the damages were to be assessed as of the date of the breach, and that the measure of such damages was the difference in value. Other cases are to the same effect.

Longfellow v. *McGregor,* 61 Minn. 494;
Province Securities Corp. v. *Maryland Cas. Co.,* 269 Mass. 75, 94;

Phillipe v. *Curran*, 218 Ill. App. 517;
Comey v. *United Surety*, 217 N. Y. 268.

As pointed out above, that difference in value may be more definitely shown by the actual cost of completion, if the building has been completed. In such case, as Judge CARDOZO said in *Comey* v. *United Surety* (*supra*), page 276:

> "The fact that he did complete it makes the proof of his damages more certain. It supplies evidence of his loss which might otherwise have depended upon the estimate of experts."

Later it was pointed out in *Kanter* v. *New Amsterdam Casualty Co.*, 195 App. Div. 756 (aff'd, 233 N. Y. 602), that if the mortgagor sought any damage beyond the actual cost of completion it would have to be by proving the difference in value, and that that difference in value would embrace all the damages.

As pointed out above, the petitioner did not offer any evidence as to difference in value other than the cost of completion.

POINT II.

Under the decisions in *Kidd* v. *McCormick* and *Trainor* v. *Aetna Casualty Co.* petitioner is not entitled to recover loss of interest on the mortgage loan, taxes or insurance premiums.

The petitioner included in its claimed cost of completion taxes and insurance premiums covering the period alleged to have been used for completion, but which were due and were paid after petitioner had purchased the property on the foreclosure sale.

It also claimed specifically for interest on the mortgage loan claimed to have been lost during the alleged period used for completion.

These three items of damage are sought not only under the express terms of the bond, which will be considered in Point III, but under the general rule of damages laid down in *Kidd* v. *McCormick* and *Trainor* v. *Aetna Casualty Co.* In neither of these cases did the court allow interest on mortgages, taxes or insurance premiums. In each case it was held that the proper measure of damages was difference in value.

In *Kidd* v. *McCormick,* the court gave its reason why difference in value was the proper measure of damage and would make the party whole. It stated.

> "The plaintiff was entitled on the first of September, 1877, that there should be finished houses, rentable, and so, productive of income with which to keep down interest on the mortgages on the lots, the taxes thereon, and insurance premiums."

It then proceeded to state that the difference in value on the date of the breach would give him full compensation. Nowhere in the opinion was it even hinted that interest, taxes and insurance premiums could be recovered as such.

In *Trainor* v. *Aetna Casualty Co.* the court used this language:

> "Petitioner was then (at the default) without remedy against the property because its mortgage was not in default. It was, therefore, obliged to sit by and await the action of others over which it had no control. In the meantime, the uncompleted buildings necessarily lay unrented, subject to expense in the way of taxes, insurance, accumulating interest, etc., deteriorating in quality and steadily declining in value."

It will be noted that the above language was used to show why the contention of the defendant was unsound that plaintiff had suffered no damages because the value of the property on the date of default was in excess of the debt to plaintiff and all prior liens. In that case the plaintiff was a third mortgagee with no right of foreclosure. Because of these circumstances, it was held that the plaintiff would be compensated by giving it the difference in value.

Clearly, the language used in the two cases mentioned is no authority for the proposition that the petitioner is entitled to recover loss of interest on the mortgage loan, taxes and insurance premiums. Argument made for the establishment of the principle stated in those cases must not be confused with the statement of the principle.

Cohens v. *Virginia,* 6 Wheat. 264, 399;
Pacific Co. v. *Peterson,* 278 U. S. 130, 136;
People v. *Tax Commissioners,* 174 N. Y. 417, 447.

POINT III.

Neither under the terms of the respondents' bond nor under the law of damages are the respondents liable to the petitioner for interest on the mortgage loan, taxes or insurance premiums.

A.

Respondents' bond did not guarantee payment of interest, taxes and insurance premiums, but only guaranteed the completion of a building.

The Circuit Court of Appeals, after reviewing the terms of the bond, expressly held that there was

> "no condition, express or implied, respecting payment of the principal or the interest on loan, taxes or

insurance, and no liability exists therefor" (R. p. 884).

Respondents feel that on a review limited to the question of damages this construction of the Circuit Court of Appeals is conclusive on the petitioner. Since petitioner has questioned this construction, however, the respondents feel that they should show that it is the only proper one that could have been put upon the terms of the bond.

The petitioner did not ask for interest on the mortgage loan because of the breach by the respondents of an obligation to pay such interest. In other words, there was no claimed contract obligation upon the part of the respondents to pay interest on the mortgage loan. Loss of interest was sought as special damages upon the express allegation that by reason of the default in completing the building the petitioner lost the interest (R. pp. 17, 18). Nowhere in the complaint can there be found an allegation that the respondents' bond guaranteed the payment of interest on the mortgage loan or taxes or insurance and that the respondents defaulted on that obligation, thereby entitling the petitioner to recover the interest, taxes and insurance.

Even though the complaint alleged that the provisions of respondents' bond obligated the respondents to pay interest on mortgage, taxes and insurance premiums, such claim would seem to be controverted by petitioner's own prior, practical interpretation of the instruments. The default in the completion of the building occurred on December 16, 1930. The action herein was instituted on or about February 18, 1932. Between these two dates there were numerous communications between the petitioner and the respondents. Detailed lists of damages claimed were delivered to the respondents by the petitioner. (Plaintiff's

Exhibits 60, 62, 66, 70, 71, 72; R. pp. 730, 732, 739, 744, 745, 752.) In none of these communications was any claim made for interest on mortgage, taxes or insurance premiums, nor was any claim made in the complaint that the respondents were obligated by contract to pay interest, taxes or premiums. The long, detailed complaint alleged that the only defaults were defaults in constructing, paying for and completing the building.

Apart from the practical construction placed upon the respondents' bond by the petitioner, the only reasonable construction of the instruments in suit is that respondents were not liable by contract for the payment of interest, taxes and premiums.

All the instruments in suit which evidenced the relations between plaintiff and Central Park Properties, Inc., show clearly that the latter assumed two separate obligations: first, the repayment of the principal of a loan in the sum of $6,650,000, with interest; second, the construction and completion of a building in accordance with the terms of the building loan agreement and plans and specifications.

That the petitioner fully understood that there were two separate obligations is shown by the fact that it sought and obtained a guaranty of performance of the bond and mortgage from one Lefcourt (R. pp 571, 578, 679).

Lefcourt's guaranty covered both the obligations mentioned,—payment of principal and interest and completion of the building,—while the surety bond executed by these respondents covered only the latter obligation, the completion of the building.

Lefcourt's collateral bond (Plaintiff's Exhibit 10) in express terms guaranteed the performance of the provisions of the bond and mortgage, including payment of principal and interest.

When we now turn to the respondents' surety bond (Plaintiff's Exhibit 2) we notice the absence of any language like the language used in the Lefcourt guaranty for the payment of principal and interest and for the performance of the bond and mortgage.

The condition of the surety bond was that it will be void: if the principal shall proceed with the *construction and completion of the building* so that it shall be constructed and completed in accordance with the building loan agreement and the plans and specifications, and ready for occupancy not later than December 16, 1930, free and clear of liens (among which is not plaintiff's mortgage) (R. pp. 595, 596); if the principal shall pay the cost of the *erection, construction and completion* (R. p. 596); if the surety shall indemnify the obligee from *loss or damage caused by the failure to construct, pay for and complete the building* (R. p. 596); if the surety shall make good any default *in constructing, paying for and completing* the building, and shall make good every other default by the principal in performing any of the other terms set forth *in the building loan agreement* to be kept and performed by the principal up to and including the completion of and payment for the building in accordance with the building loan agreement and plans and specifications, and shall indemnify the obligee against loss and damage suffered by the obligee in making good any default of the principal (R. pp. 596, 597).

There is no condition express or implied respecting payment of the principal of or the interest on the loan, taxes or insurance premiums. The building loan agreement specifically provided that the bond was to guarantee the completion of the building, not the payment of principal or interest on the loan, taxes or insurance premiums. The recital in the surety bond itself is that it was to guarantee

the completion of the building, not the performance of the bond and mortgage.

As said in *United Real Estate Co.* v. *McDonald,* 140 Mo. 605, cited with approval in *Trainor* v. *Aetna Casualty,* 290 U. S. 47:

> "The condition of the bond is not that McDonald's notes should be paid but that the house should be built."
>
> *Province Securities Corp.* v. *Maryland Cas. Co.,* 269 Mass. 75, 94;
>
> *McCauslan* v. *Zoar Holding Co.,* 131 Misc. 148, 150.

It is well settled that the obligation of the surety is not to be extended to any other subject, person or period of time or liability than is expressed or necessarily included in it.

> *Smith* v. *Molleson,* 148 N. Y. 241, 246;
> Sutherland on *Damages* (4th Ed.), Sec. 725.

Reading the building loan agreement and the bond together, only one reasonable conclusion is possible and that is that the respondents' bond was a guaranty only of the completion of the building. That is exactly what both the building loan agreement and the bond said.

> *Maloney* v. *Nelson,* 144 N. Y. 182, 186.

Petitioner's principal reliance is upon a complicated line of reasoning which takes us from a provision in the surety bond that the respondents "shall make good any and every other default by the principal in performing any of the other terms, covenants or conditions in said building loan agreement * * * up to and including the completion of and

payment for said building * * *", down to each and every provision in the bond and mortgage, although the bond and mortgage were not offered in evidence nor made a part of the case. The quoted provision follows immediately after a provision regarding default "in constructing, paying for and completing the building".

Starting with the provision quoted, petitioner argues that the principal agreed in the building loan agreement to perform the terms of the bond and mortgage; that the building loan agreement further provided that the bond of the principal would be conditioned for the repayment of the loan, and that, therefore, the respondents were liable for the repayment of the loan with interest.

In our opinion the argument is too fine spun. Any obligation to pay principal and interest on mortgage is contained in the bond and mortgage, which are not in evidence. In and by the building loan agreement the principal did not agree to pay principal and interest on the loan. It agreed to execute a bond and mortgage and that it would perform the terms of that bond and mortgage. Since, therefore, the principal in the building loan agreement did not agree to satisfy the bond and mortgage and pay interest thereon, these respondents cannot be said to have done so.

The language in the bond relied upon by petitioner is almost similar to the language in Lefcourt's guaranty, with the exception that the Lefcourt guaranty specifically mentions principal and interest, while respondents' bond does not. The Lefcourt guaranty guaranteed "that said borrower will complete and perform all the other terms and conditions of said agreement on its part to be performed, and to make all payments on its part required to be made under said agreement". That is similar to the provision in respondents' bond as to performance of the building loan

agreement. There is added to the language of the Lefcourt guaranty, however, after the words, "and to make all payments on its part required to be made under said agreement," the words "together with payment of principal and interest on the bond and mortgage mentioned in said agreement until completion of said building" (R. pp. 678, 679). The word "together" shows that the payment of principal and interest on the bond and mortgage was not a payment required to be made under the agreement.

If the petitioner intended to make the respondents liable for the performance of the bond and mortgage, it should have used explicit language to that effect. When petitioner sought a guaranty not only of the provisions of the building loan agreement but of the provisions of the bond and mortgage from Lefcourt, it did so without any uncertainty in language. Lefcourt guaranteed the performance of the provisions of all these instruments. The respondents guaranteed only the performance of the provisions in the building loan agreement.

What the petitioner is endeavoring to do is to import into the building loan agreement the covenants and provisions of the bond and mortgage, so as to make the respondents liable for the performance of the provisions of the bond and mortgage, when they agreed only to be bound for the performance of the provisions of the building loan agreement.

As to insurance, the petitioner relies on part of a sentence in the building loan agreement and leaves out that part of the sentence which shows that there was no obligation by the building loan agreement to pay premiums (R. pp. 580, 581). The whole sentence is as follows:

> "Borrower shall place through Remsen Brokerage Company, Inc., 166 Remsen Street, Brooklyn, N. Y., or any other insurance broker designated by The

> Prudence Company, Inc., from the date hereof until the expiration of said mortgage, all fire, lightning, and steam boiler explosion insurance together with any other insurance deemed necessary by lender, and any surety company bonds, affecting the buildings and improvements on said premises."

Petitioner at page 51 of its brief has quoted only "fire, lightning, and steam boiler explosion insurance together with any other insurance deemed necessary by lender," preceding the quotation with the word "pay," which does not appear in the building loan agreement.

As to taxes, petitioner claims that the respondents' bond guarantees completion free from all liens, that taxes are a lien, and that, therefore, respondents are obliged to pay the taxes. Again the petitioner has failed to call the Court's attention to the whole of the provision relied upon. The provision apparently relied upon is contained in the condition of the bond providing for the completion of the building "free and clear of and from any and all mechanics' or material men's liens or other liens, claims of architects, conditional sale contracts, chattel mortgages and charges for work and labor performed or for materials, machinery, fixtures, refrigerating units, appliances, or equpiment used, or installed in or about said building, and any municipal violations against said premises and the improvements thereon" (R. p. 596). It is apparent that the liens referred to are liens arising out of the performance of the work necessary for the completion of the building. Under well settled rules of construction the "other" liens spoken of are liens of the same nature as the specific liens mentioned and would not include taxes.

Bers v. *Erie R. R. Co.*, 225 N. Y. 543, 546;
Matter of Hermance, 71 N. Y. 481, 487.

B.

Interest on the mortgage loan as damages is not recoverable from the respondents because they assumed no obligation as to the principal of the loan, and interest as damages can not be recovered apart from the principal.

We have shown, as the Circuit Court of Appeals held, that there was no *contract* obligation upon the respondents to pay interest on the mortgage loan. Here we shall consider the interest *as damages* and establish that there is no liability on respondents to pay the interest as such.

We quote from *Matter of Trustees,* 137 N. Y. 94, 98:

> "Before interest can be allowed in any case it must be by virtue of some contract express or implied, or by virtue of some statute, or on account of the *default of the party liable to pay,* and then it is allowed as damages for the default."

Sutherland on *Damages* (4th Ed.), Secs. 300, 372;
17 C. J. 814;
Cutter v. *Mayor,* 92 N. Y. 166, 170;
Southern Cent. R. R. Co. v. *Moravia,* 61 Barb. 180, 188.

All cases and authorities recognize the distinction between interest payable by virtue of contract and that payable as damages for breach of contract.

Brewster v. *Wakefield,* 22 How. 118;
Holden v. *Trust Co.,* 100 U. S. 72;
O'Brien v. *Young,* 95 N. Y. 428;
Brady v. *Mayor,* 14 App. Div. 152;
Hamilton v. *Van Rensselaer,* 43 N. Y. 244;
Melick v. *Knox,* 44 N. Y. 676.

All of the above authorities and others too numerous to cite hold that in the absence of an express contract to pay interest, interest as damages cannot be recovered apart from the principal of the debt. The interest, being only incidental and accessory, cannot exist without the debt, cannot be separated from the debt and sued for alone.

The case which approaches nearest to the instant case is the *Hamilton* case (*supra*). There the creditor sought to recover interest accruing after the maturity of the principal debt from the third party who guaranteed the interest. Here also the petitioner seeks to recover such interest, but from those who did not guarantee interest. In the *Hamilton* case the creditor sought to recover because of the contract guaranteeing the interest. If in that case interest after maturity had been sought as damages, it would be more akin to our case.

In that case it was held that in no event would the guarantor be liable for interest as damages because "he neither agreed to pay the principal, nor to be liable for the consequences of its non-payment".

United Real Estate Co. v. *McDonald*, 140 Mo. 605;
Province Securities Corp. v. *Maryland Cas. Co.*,
269 Mass. 75, 94.

C.

No evidence was offered by petitioner to show that it suffered any loss of interest on mortgage loan, or taxes or insurance premiums, by reason of failure to complete the building.

The principal, we repeat, assumed two separate and independent obligations—the repayment of a loan evidenced by a bond and mortgage, and the completion of a building. A default on the first obligation was bound naturally and

directly to result in loss of interest on the loan, and did in fact require petitioner to pay taxes and insurance premiums to preserve its mortgage security. That default was the sole, sufficient, efficient cause of the loss. If there had been no default in repayment, a default in completion in no event could have resulted in the losses claimed. And again, the performance of the obligation to complete would not have prevented the losses claimed if the obligation to repay had not been performed. It is obvious, therefore, that there could be no connection of any kind between the failure to complete the building and the losses claimed.

The failure to complete the building under one obligation could not be the proximate cause of a loss from the failure to repay a loan under another obligation.

Milwaukee, etc. Ry. Co. v. *Kellogg,* 94 U. S. 469, 475;
Laidlaw v. *Sage,* 158 N. Y. 73, 98-102;
Wakeman v. *Wheeler,* 101 N. Y. 205, 209;
McCauslan v. *Zoar,* 131 Misc. 148, 150.

It is fundamental that a plaintiff cannot derive a greater advantage from a breach than from a performance.

Finck v. *Menke,* 31 Misc. 748;
Barnes v. *Brown,* 130 N. Y. 372, 381.

It is clear, therefore, that the petitioner cannot recover interest on the mortgage, because of respondents' failure to complete the building, for there is no assurance that the interest would have been earned, much less paid, had the building been completed.

Petitioner's reliance upon the rules stated in *Hadley* v. *Baxendale* would seem very weak in the face of the decisions in that case and in *Howard* v. *Stillwell,* 139 U. S. 199,

where that case was explained. In both cases anticipated profits of mill owners caused by delay were sought and refused. So here, petitioner seeks interest or profit on a loan because a building was not completed. In the *Howard* case the Supreme Court said:

> "The grounds upon which the general rule of excluding profits, in estimating damages, rests, are (1) that in the greater number of cases such expected profits are too dependent upon numerous uncertain and changing contingencies to constitute a definite and trustworthy measure of actual damages; (2) because such loss of profits is ordinarily remote and not, as a matter of course, the direct and immediate result of the non-fulfillment of the contract; (3) and because most frequently the engagement to pay such loss of profits, in case of default in the performance, is not a part of the contract itself, nor can it be implied from its nature and terms."

In the *Howard* case evidence was offered which would seem to have established loss of profits. In this case, the petitioner did not offer an iota of evidence tending to establish that if the building had been completed it would have been able to obtain any return from it. It has concededly relied upon a mere assumption that it could have rented it and have received in rental sufficient to pay carrying charges together with taxes, insurance and a profit of 6% on its investment. Assumption may not be used in place of evidence.

As to loss of interest on the mortgage, petitioner proved only that it had not received the interest from the borrower (R. p. 337), and that the building was not actually completed until October 1, 1931 (R. p. 111). It offered no evidence as to what a reasonable time to complete would be. It did not controvert the evidence adduced by the respon-

dents that the items of incompletion could have been completed within four to eight weeks (R. pp. 435, 436). It made no effort to explain, qualify or repudiate the evidence of its own witness adduced on cross examination that four months were spent in making alterations in the building (R. pp. 244-246). It made no effort by evidence to overcome the conceded fact that at the foreclosure sale it could have made available $6,000,000 of the principal for investment (R. p. 20). It failed to adduce testimony to show that it obtained no returns on the building in face of the proof that as early as August, 1931, the building was actually partly tenanted (R. p. 480).

It has relied entirely upon an assumption which it hoped the Court would accept that because of failure to complete the building on December 16, 1930, it lost interest on $6,575,000.

This attitude of petitioner is very clearly shown on page 31 of its brief where it states that "No court can properly assume that the rental value of a modern apartment hotel fronting on Central Park South in New York City would not in 1931, equal the interest on its first mortgage and taxes and insurance premiums, * * *".

On page 30 of its brief petitioner makes the bold statement that the respondents have never disputed that rental value would be greater than the interest and carrying charges. This statement is made in face of the fact that rental value was never in this case, no evidence was offered by the petitioner as to rental value or as to loss of rental value, and consequently there was nothing for respondents to dispute.

At pages 30 and 31 of petitioner's brief petitioner tries to get around its failure to prove that loss of interest, etc., resulted from the default in completion by saying

that the parties contemplated that the building, when erected, would rent for more than enough to pay interest on the mortgage, taxes, insurance premiums, and other carrying charges, is without substance. The principal undoubtedly hoped that such a result would follow from the completion of the building, and probably the petitioner, but certainly the respondents were not interested in whether a completed building would bring in rent sufficient to give the principal or the petitioner a profit. This was immaterial to these respondents. In view of the general economic depression prevailing in December, 1930, and thereafter it is most probable that if the building had been completed on the day fixed for completion the hopes of the principal and the petitioner in this respect would not have been realized. That would have been nothing to respondents and, concededly, in such event petitioner would have made no claim against them.

The petitioner claims that when the trial court found from a consideration of the instruments that the respondents were liable for these items, thereby it made a finding of fact, with evidence to support it. Obviously, a conclusion reached from the construction of written instruments is not a determination of fact. The construction and effect of written instruments is a question of law.

> *Swift* v. *Hocking Valley R. Co.*, 243 U. S. 281, 289;
> *Dillon* v. *Barnard*, 21 Wall. 430, 437;
> *Hamilton* v. *Liverpool, etc. Ins. Co.*, 136 U. S. 242.

Therefore, the cases cited by petitioner which hold that the direction of a verdict is conclusive upon all issues of

fact have no application. Necessarily, before such cases could have application, there would have to be a dispute of fact as to these items, and the only dispute was one of law based upon the interpretation of the written instruments.

The argument advanced at pages 25 to 27 of petitioner's brief that because interest, taxes and insurance premiums were within the contemplation of the parties as items of damage, *ipso facto* the respondents became liable for such items when the building was not completed, fails to recognize that the respondents were liable only for losses sustained, established by competent proof. Petitioner has failed to make any such proof.

Likewise, on pages 27 and 28 it claims that because respondents' bond was one of indemnity they were, therefore, responsible for these items. A sufficient answer to that is that the liability of an indemnitor is to reimburse for any loss sustained, and petitioner has failed to offer any evidence from which a conclusion could be drawn that a completed building would have yielded an income sufficient to pay the carrying charges of the items for which it claims.

Petitioner's difficulty is in satisfying the court that it should assume loss in the absence of evidence to establish a loss.

Maloney v. *Nelson*, 144 N. Y. 182.

POINT IV.

Since petitioner concedes that it is entitled to recover damages suffered by it only as mortgagee and not as owner, it may not recover interest on mortgage, taxes or insurance premiums, because the foreclosure of the mortgage and the sale of the property terminated its status as mortgagee.

On page 30 of petitioner's brief it is stated:

> "Prudence Company, recognizing that the guarantee ran to it as mortgagee rather than as owner, has not asked for the profits which would have resulted from recovery of rents."

On page 29 it claims that interest bears the same relation to money as rent does to land. If that be so, since petitioner became owner in March, 1931, it is difficult to understand how it can recover interest as profits thereafter where it could not recover rental as profits.

When the judgment of foreclosure and sale was entered and the sale thereunder made to the petitioner, the status of petitioner as mortgagee ceased and the mortgage debt was *ipso facto* merged in the judgment. A new set of relations was set up. The debt evidenced by the bond and mortgage was extinguished and a new liability, to wit, the deficiency judgment, took its place.

Hull v. *Cronk*, 55 App. Div. 83, appeal dismissed 166 N. Y. 606;
Re Diamond T. Truck Sales Agency, 282 Fed. 873, 875;
Stewart v. *Barnes*, 153 U. S. 456;
34 C. J. 752, 755.

Since the bond and mortgage ceased to exist, naturally the interest thereon ceased to exist, because whatever interest became due prior to the foreclosure was included in the deficiency judgment and there could be no interest thereafter.

Furthermore, from the sale petitioner received $6,000,000 on account of its loan. By no stretch of the imagination could petitioner be said to be entitled to interest on this sum from the date of the foreclosure sale in March, 1931, to the date of completion in October, 1931. Yet such interest was allowed by the trial court.

As to taxes and insurance premiums, they became due and payable after the petitioner became owner of the premises. The payment of these items was the obligation of the owner. The fact that the purchaser on the foreclosure sale was the petitioner instead of a third party does not change the liability of the respondents for these items.

POINT V.

The difference in value between a building with and without omissions and substitutions is the proper measure of damages for such omissions and substitutions and the petitioner offered no evidence that the value of the building was lessened by reason thereof.

Paragraph XXXVI of the complaint alleged that by reason of the omissions of numerous items and the substitutions of inferior materials "the value of said building has been materially lessened" and that it was damaged as set forth in Schedule B annexed to the complaint (R. pp. 17, 30-35). Schedule B in its revised form became Plaintiff's Exhibit 85 (R. pp. 763-766).

No evidence was offered to substantiate the claim that the value of the building had been lessened by the omissions and substitutions. Upon the trial the only evidence offered by petitioner as to the omissions was as to the reasonable cost of supplying them (R. pp. 235, 236, 468). The only evidence offered by the petitioner as to the substitutions was that the principal paid a certain amount for the items of substitution and that if the principal had installed proper items, it would have had to pay a certain larger amount. The difference between these two amounts was sought as damages (R. pp. 763-766). In certain instances the petitioner used as the amount which it would have cost the principal certain so-called cash allowances mentioned in the specifications to be included in the contractor's estimate for bidding purposes (R. pp. 661, 662).

The only direct evidence on the point of whether the value of the building had been lessened by the omissions and substitutions was given on behalf of the respondents and was to the effect that they did not lessen the value of the building (R. pp. 359, 376, 377, 404).

Not only did the petitioner fail to substantiate the allegations of its complaint but the well recognized law is that where there are omissions and substitutions it is incumbent upon the owner to establish by proof that the value of the building had been lessened. As said by Judge Cardozo in *Jacob and Youngs* v. *Kent,* 230 N. Y. 239, 244:

> "We think the measure of the allowance is not the cost of replacement, which would be great, but the difference in value, which would be nominal or nothing."

And again he said:

> " 'There may be omissions of that which could not afterwards be supplied exactly as called for by

> the contract without taking down the building to its foundations, and at the same time the omissions may not affect the value of the building for use or otherwise, except so slightly as to be hardly appreciable.' "

In that case the claim arose out of the substitution of one kind of pipe for another. An examination of Plaintiff's Exhibit 85 will show that the items therein claimed for could not be replaced without expending an amount out of all proportion to the decrease in value, if any. Among the cases recognizing the same rule are:

Trainor v. *Aetna Casualty Co.*, 290 U. S. 47;
Kidd v. *McCormick*, 8[illegible] N. Y. 391;
Walter v. *Hangen*, 71 App. Div. 40;
Ciminelli v. *Umland*, 236 App. Div. 154;
Olsen v. *Henderson*, 113 App. Div. 676;
American Surety Co. v. *Woods*, 105 Fed. 741.

Conclusion.

The determination of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 270.

THE PRUDENCE COMPANY, INC.,

Petitioner,

against

FIDELITY AND DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE.

Motion to Construe or Amend Mandate, and Brief in Support Thereof.

ALFRED T. DAVISON,
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THE PRUDENCE COMPANY, INC.,
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FIDELITY AND DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE.

Motion to Construe or Amend Mandate.

To the Honorable the Supreme Court of the United States:

COMES NOW The Prudence Company, Inc., petitioner in the above-entitled cause, and moves this court to construe or amend its mandate issued herein so as to provide that the defendants (respondents in this court) shall not recover costs in the Circuit Court of Appeals or in the alternative that such costs shall abide the event of the new trial of the action, and in support of such motion makes the following brief statement of the matter involved, and the reasons relied upon for such motion:

The case was decided by this court on February 3, 1936, by an opinion (by Mr. Justice Cardozo), which directed that the judgment of the Circuit Court of Appeals be modified by a direction that the measure of damages upon a

new trial should be that defined in the opinion of this court and as thus modified, affirmed. In effect, this court reversed the Circuit Court of Appeals with respect to the measure of damages, the issue to which the certiorari was limited.

The action.

The suit herein was brought by petitioner as obligee under a surety bond executed by defendants, Fidelity and Deposit Company of Maryland and American Bonding Company of Baltimore, to petitioner as mortgagee under a building loan agreement, by which bond defendants guaranteed the completion on or before December 16, 1930, of the building to be mortgaged as security for such building loan, in strict accordance with the plans and specifications referred to therein, and agreed fully to indemnify the plaintiff in case of breach of such bond.

After a trial of such action duly had, a verdict was rendered and a judgment entered on June 14, 1934, in favor of plaintiff against defendants in the sum of $781,-694.56, including damages by reason of (1) amounts expended by plaintiff in completion of the building; (2) difference in value by reason of omissions of and substitutions for materials called for by plans and specifications; and (3) interest lost on the net amount advanced, during the period of delay in completion, and amounts expended by petitioner for taxes and insurance premiums during such period.

Reversal by Circuit Court of Appeals.

Pursuant to an appeal taken by defendants to the United States Circuit Court of Appeals for the Second Judicial Circuit, said court on June 10, 1935, rendered a

decision reversing such judgment on the grounds (1) that damages measured by taxes, insurance premiums and lost interest (aggregating in excess of $370,000) had been improperly allowed and (2) that evidence had been excluded which might tend to show that petitioner's president, if he had authority to waive the requirement of a written waiver of the plans and specifications, might have consented to certain of the items of omission and substitution included in such judgment.

The order for mandate filed in said court on June 17, 1935, directed that the judgment of the District Court be reversed with costs and the cause remanded for a new trial.

Reversal of Circuit Court of Appeals decision by this Court on writ of certiorari.

Thereafter the Prudence Company, Inc., made due application to this Court for a writ of certiorari to review the decision and judgment of said Circuit Court of Appeals.

Certiorari was granted on October 14, 1935, limited to the question of the measure of damages. On such certiorari, this court decided in favor of petitioner, and by the opinion of Mr. Justice Cardozo aforesaid, directed that the judgment of the Circuit Court of Appeals be modified with costs to The Prudence Company against the defendants.

The modification was in fact a complete reversal on the issue of measure of damages, this Court ruling that petitioner might on the new trial recover the aforesaid items of taxes, insurance premiums and loss of interest, not to exceed the rental value (which petitioner contends was greater than the aggregate of such items) during the period of idleness of the building.

The mandate of the Supreme Court upon such decision was filed in the office of the Clerk of the United States District Court for the Southern District of New York on March 2, 1936. No order has been entered thereon.

The issuance of mandate by the Circuit Court of Appeals pursuant to its order for mandate dated June 17, 1935, was stayed by that court pending the consideration and decision of the petition for certiorari by this court, and no mandate has been issued by said Circuit Court of Appeals.

Attempted taxation of costs by defendants.

Defendants nevertheless on March 14, 1936, after the service by petitioner of a notice of taxation of its costs upon the mandate of this Court, in the sum of $1,011.30, served upon plaintiff's attorney a notice of taxation of the costs of the defendants in said Circuit Court of Appeals, in the sum of $1,407.15, to be taxed before the Clerk of said District Court.

Thereafter, on March 17, 1936, defendants served upon plaintiff's attorney a notice of withdrawal of such bill of costs, and a notice of taxation of a new bill of costs in the sum of $10,707.49, including an item of $9,294.84 (which petitioner does not concede to be a proper item of costs herein), alleged by defendants to be for premium paid for a supersedeas bond to stay the execution of the judgment pending defendants' appeal to the Circuit Court of Appeals.

Neither of such bills of costs has yet been taxed, the time for taxation thereof having been from time to time adjourned to March 25, 1936, and such taxation having been further stayed by an order of said Circuit Court of Appeals dated March 24, 1936 (to which more detailed reference is hereinafter made).

Reasons for granting this motion.

Pursuant to the Calendar Rules of the District Court, the new trial of the issues in this action has been set down for April 13, 1936, and this cause has been placed at the head of the trial calendar for such date.

The result of the modification of the judgment of said Circuit Court of Appeals by this court is such that the judgment on the new trial of this action, pursuant to the principles laid down in the opinion of this court, will be at least equal in amount to, and perhaps in excess of, that rendered at the first trial.

Since the result of this court's action upon the certiorari herein may be that the success of defendants on their appeal to the Circuit Court of Appeals is only nominal, and that they may be ultimately required to pay a judgment at least equal in amount to that already recovered, it is not proper that they should be allowed at this time the costs of their appeal to the Circuit Court of Appeals. Particularly is it inappropriate and improper that they should be granted the cost of a supersedeas bond obtained in connection with their review of a judgment which has been sustained in its major aspects by this court, and which is remanded for new trial only because of evidence of hypothetical relevance which the Circuit Court of Appeals held should have been admitted, affecting only the amount of one of the items of damages to which both the Circuit Court of Appeals and this Court have held that petitioner is entitled.

The incidence of the costs of the appeal to the Circuit Court of Appeals was not presented to this court upon the certiorari herein, such writ of certiorari being limited to the question of measure of damages. Moreover, the question could not well have been presented or understood in

its entire significance in the absence of information concerning the items of costs which defendants now seek to tax.

Furthermore, in view of the fact that judgment in some amount must ultimately be rendered in favor of the petitioner, it is neither just nor proper that petitioner be required to pay any money to defendants as costs before it has been paid any part of the amounts due it by reason of the breach of the bond executed to it by defendants.

No previous application has been made to any court or judge for the relief herein requested, except that the above-mentioned order, dated March 24, 1936, has been obtained from the Circuit Court of Appeals to show cause why its order for mandate should not be amended so as to provide that costs abide the event of the retrial of such action.

Application is made to this court because the defendants claim to be taxing their costs by authority of the mandate of this court, even though such mandate makes no specific reference to the costs in the Circuit Court of Appeals.

Application is made to this Court because also of its plenary power to amend its mandate with respect to costs to any party in any of the lower courts.

WHEREFORE petitioner respectfully prays for an order construing or amending the mandate of this court so as to provide that defendants shall not recover costs in the Circuit Court of Appeals, or in the alternative that such costs shall abide the event of the retrial of the action, and for such other and further relief as may be just and proper.

Dated, New York, March 27, 1936.

ALFRED T. DAVISON,
Counsel for Petitioner,
The Prudence Company, Inc.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935—No. 270.

THE PRUDENCE COMPANY, INC.,
Petitioner,

against

FIDELITY AND DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE.

BRIEF IN SUPPORT OF MOTION TO CONSTRUE OR AMEND MANDATE.

The Motion.

This motion seeks an order construing or amending the mandate of this court to provide either (1) that the defendants (the defeated party in this court) are not entitled to costs in the Circuit Court of Appeals or (2) that the costs in the Circuit Court of Appeals shall abide the event of the new trial of the action.

Although the only mention of costs in the mandate of this court is the statement, "The Prudence Company to recover its taxable costs in this court", and although no mandate has been issued by the Circuit Court of Appeals, the defendants claim the right under the mandate of this court to tax their costs on the appeal to the Circuit Court of Appeals.

The amount of costs involved is $10,707.49, principally representing the amount of "premium paid for supersedeas

bond", to stay the execution of the judgment of the District Court.

The necessary facts are set forth in the foregoing motion.

This court has jurisdiction of the present motion.

There can be no doubt that this court has jurisdiction, during the term, to interpret or modify its own mandate. An example of the exercise of such jurisdiction is *United States* v. *Reading Co.*, 228 U. S. 158.

The doubts which exist as to the right to appeal for error affecting only matter of costs (*The James McWilliams*, 49 F. (2d) 1026, C. C. A. 2) require that this court determine the matter immediately, rather than await action by the lower court, and appeals therefrom.

Because the costs now sought to be taxed pertain to the appeal to the Circuit Court of Appeals, and also because of the limited nature of this court's grant of certiorari, petitioner has moved in the Circuit Court of Appeals also for an amendment of its order for mandate. Especially in view of the amount involved, caution required that such action be taken.

We submit, however, that full jurisdiction resides in this court by virtue of the writ of certiorari issued by it, and that no costs may be taxed in any court except as allowed by the mandate of this court.

The jurisdiction of this court includes the power to make directions with respect to costs in the Circuit Court of Appeals. This power is clearly recognized in *Barber Asphalt Co.* v. *Standard Asphalt & Rubber Co.*, 275 U. S. 372, 387. In that case this court, although reversing the judgment of the Circuit Court of Appeals, nevertheless directed that the appellant pay the costs, both in this court

and in the Court of Appeals. See also *Collie v. Fergusson*, 281 U. S. 52, 57.

This court, therefore, has power in this cause to direct,—if indeed that be not already the effect of its mandate,—that defendants shall not recover their costs in the Circuit Court of Appeals.

I.

The mandate does not authorize the taxation of costs in favor of defendants.

The pertinent portions of the mandate of this court read:

> "The judgment of the Circuit Court of Appeals is * * * modified as indicated in the opinion of this Court and, as thus modified, affirmed, The Prudence Company to recover its taxable costs in this Court.
>
> * * * * * * *
>
> And it is further ordered, That this cause be, and the same is hereby, remanded to the District Court of the United States for the Southern District of New York for further proceedings in conformity with the opinion of this Court."

The opinion of this court requires a new trial, but makes no reference to any award of costs to defendants, the unsuccessful parties. On the contrary, the allowance of costs to petitioner is clear evidence that the decision of this court, although in terms a modification, was in substance in its favor.

It is true that the order for mandate of the Circuit Court of Appeals provided that the decree "is reversed with costs", but it is not to be presumed that such costs are still

to be awarded after a substantial modification (practically a reversal) of the Circuit Court of Appeals' judgment by this court, with no mention by this court of the costs below.

In case of modification or reversal, costs are not awarded as of course, but rest in the discretion of the appellate court (6 Cyc. Fed. Procedure, Sec. 3047), which may "otherwise order" (Supreme Court Rule 32 (3), Second Circuit Court of Appeals Rule 28 (3)). When costs have been awarded to the petitioner by this court, there is no basis for a taxation of costs by defendants.

II.

The mandate of this court, if it may be construed as authorizing taxation of costs in the Circuit Court of Appeals to defendants, should be amended to provide that such costs be denied, or else abide the event of the new trial.

The decision of this court removes any substantial benefit which defendants might have obtained from the judgment of the Circuit Court of Appeals, and thus makes it improper to award costs in the Circuit Court of Appeals absolutely to defendants.

Provision that costs shall abide the event, in case a new trial is ordered, is the established rule in the courts of New York State. (*Wynkoop Hallenbeck Crawford Co.* v. *Western Union Tel. Co.*, 268 N. Y. 108, 113; *Noonan* v. *Sonn & Co.*, 268 N. Y. 462; *Gordon* v. *Krellman*, 207 App. Div. 773, 783; *Shewan & Sons* v. *Union Sulphur Co.*, 139 Misc. 860.)

No Federal statute covers the subject of costs in case of reversal or modification on appeal, or directs any different rule.

The Federal courts, having discretionary power with respect to the award of costs in case of reversal and remand, should properly follow the state rule. See *Ethridge* v. *Jackson*, 8 Fed. Cas. No. 4,541; *Huntress* v. *Town of Epsom*, 15 Fed. 732; cf. *Ex parte Peterson*, 253 U. S. 300, 317.

The results of the defendants' appeal do not justify an award of costs to them.

The only question before this court on certiorari was the measure of damages to which petitioner would be entitled on a new trial. The decision of the Circuit Court of Appeals had already eliminated all the purported total defenses asserted by defendants.

This court restored the only major item of damages which the Circuit Court of Appeals had disallowed. Out of total damages (exclusive of interest thereon) allowed by Judge Galston of $665,654.66, the items of taxes, insurance premiums, and interest lost, representing the damages for delay by reason of the failure to complete the building within the time guaranteed by defendants, amounted to $369,477.53. This court held, in its opinion, that petitioner's proof of such items was sufficient at the first trial.

Whatever justification the Circuit Court of Appeals may have had for awarding costs absolutely to defendants who had succeeded in reducing an award of damages by more than half, the entire justification for an award of costs is removed when such item has been restored to petitioner by this court.

The remaining issue on which the Circuit Court of Appeals directed a new trial,—and which was not before this court,—is insubstantial and of only trivial effect, if any, on the amount of the ultimate judgment. That court

held—in spite of the provision in the surety bond itself, that no changes from the plans and specifications should be binding on petitioner unless (1) in writing (2), signed by duly authorized officers of the petitioner, and (3) specifying the particular items so released—that defendants should have been permitted to introduce evidence tending to show parol consent by petitioner's president to certain substitutions made, and that such evidence might have been relevant *if* petitioner's president had authority to waive the requirement of written waiver. The only evidence of any sort meeting that description was a question put to Mr. Grad, former architect for the builder, whether he had not, after his discharge, told petitioner's president about "certain things which in your opinion were not in accordance with the plans and specifications". Since there was (1) no written waiver or release to the defendants, (2) no signature by a duly authorized officer of petitioner, and (3) no specification of any item released, this court may not be asked to presume that the result of consideration of such evidence on a new trial will be any material reduction of the damages by reason of omissions and substitutions. Any reduction whatever is hypothetical and, we contend, will prove non-existent.

As the case stands, therefore, the defendants are indebted to petitioner in an amount still unliquidated, but which may (without interest) amount to as much as $709,000.* They should not be rewarded for the delay in liquidation of the amount due by a direction that the petitioner (their creditor) pay them—in advance of any payment to it on account of its debt—over $10,000 of claimed costs.

---

* This will be the amount of the recovery if certain minor items which Judge Galston held were not sufficiently proved at the first trial, are included in the judgment at the second trial.

III.

Costs of the supersedeas bond should in any event be denied under the mandate of this court.

Under certain circumstances, where a defendant has obtained the final dismissal of the complaint against him, the practice in the Second Circuit has permitted the taxation of the costs of a supersedeas bond (*Williams* v. *Sawyer Bros.*, 51 F. (2d) 1004). No case which we have discovered permits the taxation of such an item, however, where defendant has obtained only a direction for a new trial, with the possibility of plaintiff obtaining the same or a greater verdict upon such new trial.

The only theory of taxing a supersedeas bond as costs, must be that the payment was necessary to prevent the collection of sums not justly due from defendant. In this case there has been no final determination that the sum bonded by the supersedeas bond is not in fact justly due. The decision is merely that the determination of the precise amount must await liquidation at a new trial. Defendants therefore should not be permitted to claim from petitioner the cost of such bond.

The usual rule forbids inclusion of the premium on a supersedeas bond as costs in any case. *Lee Injector Mfg. Co.* v. *Penberthy Injector Co.*, 109 Fed. 964 (C. C. A. 6).

Conclusion.

This court should enter an order herein ~~recalling~~ construing or amending its mandate so that it shall provide that defendants shall not recover costs in the Circuit Court of Appeals, or in the alternative, that costs in the Circuit Court of Appeals abide the event of the new trial.

Dated, New York, March 27, 1936.

Respectfully submitted,

ALFRED T. DAVISON,
Counsel for Petitioner.

ORRIN G. JUDD,
ALFRED T. DAVISON,
of Counsel.

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CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 270.

THE PRUDENCE COMPANY, INC.,
Petitioner,

against

FIDELITY AND DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE.

Reply Brief on Motion to Construe or Amend Mandate.

ALFRED T. DAVISON,
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ORRIN G. JUDD,
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Of Counsel.

Appeal Printing Co., 22 Thames St., N. Y. - WOrth 2-3242

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935—No. 270.

THE PRUDENCE COMPANY, INC.,
Petitioner,

against

FIDELITY AND DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE,
Respondents.

Reply Brief on Motion to Construe or Amend Mandate.

Certain errors in respondents' brief should be corrected:

1. *St. Louis & San Francisco R. Co.* v. *Spiller*, 275 U. S. 156, does not indicate any restrictions on this court's power to amend its mandate during the term. Its holding is that clerical errors may be corrected even *after* the expiration of the term at which the judgment was entered.

2. This motion is not, as contended by respondents, a motion for rehearing. The opinion of this court gave no directions as to costs, the first provision appearing in the mandate. This motion was made as promptly as possible after the filing of the mandate and the attempt by respondents to construe it as including over $10,000 of costs which had not previously been so much as mentioned.

Since this court's decision does not justify the allowance of costs to respondents in the Circuit Court of Appeals, it is

proper now to make clear that the mandate was intended so to provide.

3. Respondents are mistaken in suggesting (brief, p. 3) that the Circuit Court of Appeals reversed on the third ground that recovery for omissions and substitutions "was limited to the extent that they diminished the value of the building." Only two grounds of reversal appear in the Circuit Court of Appeals' opinion, namely, (1) the allowance of interest, insurance and taxes, and (2) the exclusion of evidence of waiver.

The claim that there was insufficient proof of diminution in value of the building by the omissions and substitutions was made by respondents in the Circuit Court of Appeals, and not included in that court's grounds of reversal.

The claim was first brought into this court by respondents (their brief on certiorari, pp. 35-37), but without any assertion that it had been sustained by the Circuit Court of Appeals. Since a respondent may urge any argument, even one rejected below, to support a judgment sought to be reversed, petitioner felt called on to answer the argument in its reply brief.

The claim is now made for the first time, as a reason for now allowing respondents their costs in the Circuit Court of Appeals, that that court had inferentially sustained their position with respect to proof of damages by omissions and substitutions. Since respondents (brief, p. 3) now claim that their new interpretation of the Circuit Court of Appeals' opinion has some support in the final paragraph of this court's opinion, the decision on this motion may appropriately make clear also that this court did not intend to construe the Circuit Court of Appeals' opinion as being contrary to the District Court's ruling on recovery for omissions and substitutions.

4. *Jennings* v. *Burton*, 177 Fed. 603, does not hold, as respondents allege, that costs may not be directed to abide the event. It simply holds that, if they have been awarded absolutely, they cannot be taxed later as a disbursement by the successful plaintiff.

5. We are not aware of the basis for the statement that respondents requested petitioner to waive the furnishing of a supersedeas bond.

Dated, April 4, 1936.

Respectfully submitted,

ALFRED T. DAVISON,
Counsel for Petitioner.

ALFRED T. DAVISON,
ORRIN G. JUDD,
Of Counsel.

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APR 6 1

Supreme Court of the United States

October Term, 1935

THE PRUDENCE COMPANY, INC.,
Petitioner,

against

FIDELITY AND DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE,
Respondents.

No. 270

BRIEF IN OPPOSITION TO "MOTION TO CONSTRUE OR AMEND MANDATE".

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Counsel for Respondents.

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Supreme Court of the United States

October Term, 1935

THE PRUDENCE COMPANY, INC., *Petitioner,* *against* FIDELITY AND DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE, *Respondents.*	**No. 270**

BRIEF IN OPPOSITION TO "MOTION TO CONSTRUE OR AMEND MANDATE".

POINT I.

The mandate follows strictly the judgment of this Court and does not require either construction or amendment.

The judgment of this Court, dated February 3, 1935, provides in its material part as follows:

> "ON CONSIDERATION WHEREOF, It is ordered and adjudged by this Court that the judgment of the said United States Circuit Court of Appeals, in this cause, be, and the same is hereby, modified as indicated in the opinion of this Court and, as thus modified, affirmed, The Prudence Company to recover its taxable costs in this Court."

The mandate to the District Court of the United States for the Southern District of New York included the provision from the judgment above quoted. It then ordered that the Prudence Company recover costs in the sum of $102.85.

No construction or interpretation is needed to arrive at the determination of this Court embodied in its opinion and judgment. Except for the modification contained in the opinion of this Court and carried into the judgment, that upon the new trial the District Court should follow the rules laid down for the measurement of damages, the judgment of the Circuit Court of Appeals was affirmed. The judgment of the latter court provided for an allowance of costs to the respondents here, and for execution (R. p. 885).

Furthermore, since the mandate is in exact conformity with the provisions of the opinion and the judgment of this Court, there is no reason for the amendment of the mandate. Although a mandate may be amended where the clerk has made such an error therein that it does not conform with the judgment (*St. Louis & San Francisco R. Co.* v. *Spiller*, 275 U. S. 156), this mandate is in exact conformity with the judgment.

The motion here does not assume to be one to amend the judgment of this Court.

POINT II.

The motion is, in effect, one for a rehearing, which should be denied because not made in accord with the rules of this Court, and because the order granting certiorari does not permit the consideration of the question now presented.

The motion assumes to be one to construe or amend the mandate so as to provide that the judgment of the Circuit Court of Appeals allowing costs to the respondents should be reversed, or that such judgment should be modified to provide that the allowance of costs should abide the event of another trial.

The Circuit Court of Appeals held that the District Court was in error in allowing interest on mortgage and taxes and in excluding evidence of waiver by petition of omissions and substitutions. That court also held that recovery for omissions and substitutions, if not waived, was limited to the extent that they diminished the value of the building. No evidence had been offered by the petitioner on the former trial to establish such loss of value.

As pointed out in this Court's opinion, the petitioner did not specify as error in the petition for the writ of certiorari the ruling of the Circuit Court of Appeals that there must be evidence of diminished value before recovery could be had for omissions and substitutions, and for that reason the ruling was not reviewed by this Court and was assumed to be correct.

This Court also refused to consider the ruling of the Circuit Court of Appeals on the question of waiver. This Court limited its review solely to the question of whether the measure of damages to be applied would justify the re-

covery of loss of rental value during the period of delay in completion.

Impliedly, therefore, this Court approved the granting of a new trial by the Circuit Court of Appeals. This Court did not intend to and did not review the judgment of the Circuit Court of Appeals in its entirety. This Court did not reverse the judgment of the Circuit Court of Appeals in its entirety. The judgment of the Circuit Court of Appleads was modified, as shown by this Court's opinion, its judgment and its mandate, "by a direction that the measure of damages upon a new trial shall be that defined in this opinion, and as thus modified affirmed".

It does not seem open to doubt that that part of the judgment of the Circuit Court of Appeals which allowed costs to the respondents was affirmed by this Court.

For this Court now to consider the motion of the petitioner, it would be necessary, in effect, to grant a rehearing after the time for rehearing has expired, and to consider a matter which was not before it under its order granting a writ of certiorari.

A.

Under Rule 33 of the rules of this Court, a petition for a rehearing should be filed within twenty-five days after the judgment is entered, unless the time is enlarged by order of the Court.

The judgment herein was entered on February 3, 1936, and the time for rehearing expired on February 28, 1936.

No application was made for an extension of the time within which a petition for rehearing might be filed.

Under the circumstances, it is obvious that the petitioner is out of time on a petition for rehearing, and no facts have been presented in the motion papers to justify the hearing of the petition for rehearing after the time has expired.

B.

This Court, in granting the writ of certiorari, so limited the scope of its review as to preclude the consideration of the question whether that part of the judgment of the Circuit Court of Appeals awarding costs to the respondents should be reversed.

Rule 32, subdivision 3, of this Court, provides that in cases of reversal of any judgment by this Court, costs shall be allowed to the appellant or petitioner, unless otherwise ordered.

The same practice is followed in the Circuit Court of Appeals for the Second Circuit. Its Rule 28, Subdivision 3, provides that in cases of reversal of any judgment in that court, costs shall be allowed to the party seeking review, unless otherwise ordered.

Under that practice the Circuit Court of Appeals, when reversing the judgment in this case, allowed costs to the respondents, and this Court, because it reversed the Circuit Court of Appeals in part, allowed costs to the petitioner in this Court.

Although this Court has no rule prescribing whether costs shall be allowed when the judgment is reversed only in part, it has long been the practice of the clerk to insert in the mandate in such cases a provision for payment of costs by the respondent, in the absence of specific direction by the Court.

St. Louis & S. F. R. Co. v. *Spiller,* 275 U. S. 156.

The judgment herein provided for the allowance of costs to the petitioner in this Court.

The reason why costs on reversal are uniformly allowed absolutely to the appellant is explained by the late Judge LACOMBE in *Jennings* v. *Burton,* 177 Fed. 603. In that case

the Circuit Court of Appeals reversed a judgment with costs (meaning costs of appeal), and declined to direct that they abide the event of a new trial. When the plaintiff recovered a judgment after the second trial, he wished to tax the costs which he had paid on the appeal, which was not permitted by Judge LACOMBE, who there stated:

> "The appellate tribunal imposed costs for error committed on the trial, for which defendant in error must be held responsible, and to allow reimbursement in the way suggested would practically be to annul its decision. I have consulted with the other Circuit judges before filing this memorandum."

Costs were allowed to the petitioner in this Court because it was able to satisfy this Court that the Circuit Court of Appeals was wrong in the respect that it limited the petitioner too greatly. The Circuit Court of Appeals allowed costs to the respondents in that court because it held that the trial court was wrong in certain respects.

This Court has not determined and it refused to determine that the Circuit Court of Appeals was not correct in holding that the Trial Court was wrong in certain respects. Since it is a general rule of practice that costs go to the prevailing party, no conceivable reason can be advanced why the prevailing party in the Circuit Court of Appeals should not be entitled to its costs.

In *Bailey* v. *Mississippi Home Telephone Co.*, 254 Fed. 358, the Court pointed out that the Pennsylvania rule that costs on a reversal are to abide the event of the suit does not obtain in the Federal courts.

The practice is general to allow costs to the prevailing party on appeal.

Miller v. *Hartwell*, 271 Fed. 385;
Berthold v. *Burton*, 169 Fed. 495.

The suggestion in the brief of petitioner that because it is the established rule in the courts of New York State that costs on appeal shall abide the event of the new trial, therefore such costs should abide the event of a new trial in the Federal courts, is without substance.

Section 1490 of the New York Civil Practice Act provides:

> "Upon an appeal from the final judgment in an action, the recovery of costs is regulated as follows:
>
> 1. In an action wherein plaintiff is entitled to costs as of course, the respondent is entitled to costs upon the affirmance, and the appellant upon the reversal, of the judgment appealed from; except that, where a new trial is directed, costs may be awarded to either party, absolutely or to abide the event, in the discretion of the court."

Under that section the appellate courts in New York have at times awarded costs absolutely to the appellant even where a new trial was ordered.

Sheehan v. *Coffey,* 208 App. Div. 240.

Even under the New York statute, therefore, it is obvious that it is within the discretion of the appellate court whether it will allow costs to the prevailing party absolutely. Although it may be the established practice to make the costs abide the event, there still is discretion in the court.

The only difference between that rule and the rule in the Circuit Court of Appeals, as well as in this Court, is that it is the established practice in the latter courts to allow costs absolutely to the prevailing party.

Since this Court refused, by its order for certiorari, to consider whether the Circuit Court of Appeals was justified

in allowing costs to these respondents, to now consider petitioner's motion would be to extend the scope of its review without order and under the guise of a motion to amend the mandate.

POINT III.

There is no justification for the statement in the moving papers respecting the plaintiff's recovery on the retrial.

We make this point only because we do not wish the Court to believe from our silence that we concur with the unjustified statement in the moving papers that the amount of the recovery on a retrial will be at least as large as the recovery after the first trial.

On the retrial, in accordance with this Court's opinion, the jury will have for consideration three items of damage; first, the amount necessarily spent to complete the building; secondly, the diminished value of the building by reason of omissions and substitutions; thirdly, the loss of rental value by reason of delay in completion.

Upon the former trial the plaintiff was allowed as a recovery for incomplete items the sum of $153,893.73. As pointed out in the opinion of the Circuit Court of Appeals, petitioner's own employees reported on the date of the default that the amount required to complete the building was $23,500.

At the previous trial the petitioner was allowed as recovery for omissions and substitutions the sum of $143,842.28, without one scintilla of evidence in the case that the value of the building had been decreased by the omissions and substitutions, and in the face of defendants' evidence that there had been no decrease.

The petitioner was allowed a recovery by the trial court before for the sum of $369,517.53 for interest on mortgage and taxes. Petitioner now claims that it will have no difficulty in establishing loss of rental to that extent.

At the previous trial the petitioner offered no evidence to establish the reasonable length of time it would take to do the work required to complete. If the jury sees fit to give credence to the petitioner's own inspector that it would cost $23,500 to complete, likewise the jury might well conclude that it would not take nine and one-half months to do $23,500 worth of work.

POINT IV.

The respondents are entitled to recover as costs the premium paid for a supersedeas bond.

After the judgment was rendered in the District Court, the respondents requested of petitioner that it waive the enormous supersedeas bond which would otherwise be required in order to stay proceedings under the judgment. That request was refused. It was no simple matter to obtain a supersedeas bond in the amount required. Under the rules of the court, the authorized surety companies are limited in the amounts which they can write. However, the supersedeas bond was furnished at great expense to the respondents.

The petitioner had a right to require the furnishing of a supersedeas bond. It also had the option of waiving such a bond, thereby relieving the respondents of the necessity of incurring this great expense. Having insisted upon the incurring of that expense, there is no valid reason why it should not now pay for that expense since the judgment to supersede which the expense was incurred was improper.

It has been the uniform practice in the Second Circuit to allow premiums on supersedeas bonds as proper items of disbursements. Judge LACOMBE allowed such premiums in the case of *Edison* v. *American Mutoscope Co.*, 117 Fed. 192. In *Consolidated Gas Co.* v. *Newton*, 291 Fed. 704, Judge LEARNED HAND, after referring to the decision of Judge LACOMBE in the *Edison* case *(supra)*, said:

> "It has * * * been our uniform custom to allow such items (premiums on supersedeas bond) in all sides of this court for the fourteen years that I have sat here, and no distinction has ever been drawn between law, equity or admiralty."

This very Court affirmed that holding of Judge LEARNED HAND in *Newton* v. *Consolidated Gas Co.*, 265 U. S. 78.

That practice of allowing such premiums to be taxed was reaffirmed by the Circuit Court of Appeals for the Second Circuit in *Williams* v. *Sawyer*, 51 Fed. (2d) 1004.

Such premiums are allowable as disbursements under Section 1518, subdivision 9 (a) of the New York Civil Practice Act, which provides:

> "The reasonable expense actually incurred in securing an undertaking to stay execution under a judgment or to stay the enforcement of a judgment in any other manner or the enforcement of a decree in equity subsequently reversed."

Conclusion.

The motion should in all respects be denied.

Respectfully submitted,

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Counsel for Respondents.

SUPREME COURT OF THE UNITED STATES.

No. 270.—October Term, 1935.

The Prudence Company, Inc., Petitioner, *vs.* Fidelity & Deposit Company of Maryland and American Bonding Company of Baltimore, Respondents. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[February 3, 1936.]

Mr. Justice Cardozo delivered the opinion of the Court.

We are to determine the measure of damages upon a bond conditioned against loss through the failure to complete a building at the time and in the manner called for by the building contract.

In September, 1929, petitioner, the Prudence Company, Inc., undertook to make a mortgage loan of $6,650,000 in aid of the construction of Essex House, an apartment hotel in the City of New York. The borrower covenanted that the building would conform to plans and specifications, and would be completed not later than December 16, 1930. As part of the same transaction, two surety companies, the respondents in this court, signed a bond in the sum of $3,000,000, indemnifying the lender against loss through the failure of the borrower to construct and pay for a building conforming to the contract, and complete it by the stated time. The bond also provided that in the event of the borrower's default, the lender, if it so elected, should be at liberty to go forward with the work, and charge the cost against the sureties. Other conditions are believed to be immaterial to any question now before us.

On December 16, 1930, the borrower made default under the mortgage, abandoning the work with the building then unfinished. At that time the petitioner's advances under the building loan agreement were $6,575,000, the full amount promised, less $75,000 retained by agreement. On December 18, 1930, petitioner through its nominee brought suit in the state court for the foreclosure of the mortgage. On January 6, 1931, it went into possession with the mortgagor's consent. On January 19, 1931, there was a judgment of foreclosure, followed by a sale on March 17, 1931, at which the mortgagee was the buyer, the bid of $6,000,000 being applied upon the mortgage. A deficiency judgment of $716,215.02 was entered the next month.

Petitioner in possession of the building went on with the unfinished work, bringing it to completion in October, 1931. An action on the bond was then begun against the sureties. The trial court gave judgment for damages in the sum of $798,416.81, made up of three classes of items: the cost of completion; the loss from omissions and inferior substitutions; and the interest on investment, together with taxes and insurance charges, while the building was idle because unready for its occupants. 7 F. Supp. 392. The Circuit Court of Appeals for the Second Circuit found this award to be excessive. In the view of that court no award should have been made for interest, taxes or insurance during the period of idleness. Payments necessary to complete the building were properly allowed, for they were evidence of the difference in value between an incomplete and a completed structure. Reparation was also to be made for omissions and substitutions to the extent that they diminished value, unless strict compliance had been waived by the lender or its agents. However, the extent of the recovery was not susceptible of ascertainment without the aid of a new trial. This was so because evidence of waiver had been offered by the surety and erroneously excluded. A remand was thus necessary to elicit all the facts. 77 F. (2d) 834. Before a second trial was had, a writ of certiorari issued at the instance of petitioner to resolve a claim of conflict between the decision to be reviewed and a decision of this court. *Trainor Co.* v. *Aetna Casualty & Surety Co.*, 290 U. S. 47. The writ states that it is "limited to the question of the measure of damages", thus excluding from our consideration the ruling of the court below as to the effect of waiver of performance.

Limiting our review accordingly, we think the extent of the recovery upon the new trial that will be necessary has been too narrowly confined.

The petitioner should be placed in the same position it would have occupied if the building had been completed on December 16, 1930. *Trainor Co.* v. *Aetna Casualty & Surety Co., supra,* at pp. 54, 55; *Kidd* v. *McCormick,* 83 N. Y. 391, 398; *Province Securities Corp.* v. *Maryland Casualty Co.*, 269 Mass. 75, 94. To give it nothing but the cost of doing the unfinished work, plus the loss resulting from omissions and substitutions, would be a scant measure of reparation, allowing nothing for delay. *Ruff* v. *Rinaldo,* 55 N. Y. 664; *C. W. Hunt Co.* v. *Boston Elevated Ry. Co.*, 199 Mass. 220, 233, 235; Sedgwick, Damages, 9th ed., § 645. If performance

had been prompt, the mortgagee would have had the security of a finished structure, which a buyer at a foreclosure sale could have utilized at once. During the pendency of the suit, the rents might have been impounded at the hands of a receiver and applied upon the deficiency resulting from the sale. *Freedman's Saving & Trust Co.* v. *Shepherd*, 127 U. S. 494, 503; *Worthen Co.* v. *Kavanagh*, 295 U. S. 56, 62. With the building still unfinished there were no rents to be collected and hence none to be applied in reduction of the debt. More important still, the amount of any bid was certain to be reduced by notice to the bidders that the building would be unproductive until ready to be occupied. From the point of view of bidders the reduction in value as the consequence of delay would be made up of two factors: the estimated cost of finishing the work, and the estimated carrying charges, not to exceed the rental value, during the period of idleness. Cf. *Trainor Co.* v. *Aetna Casualty & Surety Co., supra*, at p. 55; *Kidd* v. *McCormick, supra*, at p. 398. So at least an assessor of the damages might find as a fair inference of fact, even if the finding does not follow as an inference of law. The effect of the decision is to hold down the recovery to the first of these factors and to eliminate the second.

The petitioner might have relied upon the testimony of experts as to the total depreciation and as to the weight of the component factors. It chose a different method. To show the loss sustained from finishing the work, it proved the actual cost, as by the express provisions of the bond it was at liberty to do. Cf. *Comey* v. *United Surety Co.*, 217 N. Y. 268, 276; *Appleton* v. *Marx*, 191 N. Y. 81, 85, 86. One of the factors of diminished value it has thus established with precision. To fix the weight of the other factor, it would have done better to give evidence by experts of the rental value of such a building at the date of the default and later. *Griffin* v. *Colver*, 16 N. Y. 489, 496; *Cassidy* v. *Le Fevre*, 45 N. Y. 562, 567; *Witherbee* v. *Meyer*, 155 N. Y. 446, 453, 454. Instead of doing this it chose to give evidence of the taxes, insurance premiums and interest on investment. We are told by the respondents now that for anything appearing in the record the carrying charges may have been greater than any rents that could have been earned if the building had been finished. No such objection was made upon the trial. We think it comes too late when first made upon appeal. In the absence of more specific challenge the trier of the facts might not improperly assume that interest on the investment along

with taxes and insurance were losses flowing from the failure to receive a finished building. *New York and Colorado Mining Syndicate* v. *Fraser*, 130 U. S. 611, 622, 623. The point will not be labored, for the assumption is a safe one that evidence and objection will not be subject to this criticism when the case is tried again.

A question is raised as to the form of the complaint. The respondents insist that its allegations are insufficient to permit proof of loss of rents in addition to the cost. We read the pleading otherwise. In the circumstances of this case, loss of rents is to be reckoned as general, not special, damage. Sedgwick, Damages, 9th ed., § 1261; *Griffin* v. *Colver, supra; Cassidy* v. *Le Fevre, supra; Ruff* v. *Rinaldo, supra; Jutte* v. *Hughes*, 67 N. Y. 267, 271. It is one of the factors contributing to and measuring the diminished worth of the security. Damages when general are recoverable under a pleading that does not enumerate the items. *Armstrong* v. *Percy*, 5 Wend. 536, 538, 539; *Laraway* v. *Perkins*, 10 N. Y. 371, 373. Here the complaint alleges that except for the default and in particular the delay, the plaintiff would have obtained upon foreclosure the full amount of principal and interest due upon the mortgage; it alleges that through the same causes the value of the mortgage was impaired to the extent of the deficiency judgment; it alleges that the plaintiff has thereby been deprived of any and all return on the amount of the investment. We find these allegations broad enought to let in evidence of damages along the lines that have been marked.

Another trial will permit the petitioner to show more accurately than it has done upon the record now before us that the building was continuously untenantable until the completion of the work and that the time taken for completion did not outrun the bounds of reason.

What was ruled by the Court of Appeals in respect of the scope of the recovery for omissions and substitutions was not specified as error in the petition for the writ, and will be assumed to be correct. *Zellerbach Paper Co.* v. *Helvering*, 293 U. S. 172, 182; *Helvering* v. *Taylor*, 293 U. S. 507, 511; *Clark* v. *Williard*, 294 U. S. 211, 216.

The judgment is modified by a direction that the measure of damages upon a new trial shall be that defined in this opinion, and as thus modified affirmed.

It is so ordered.